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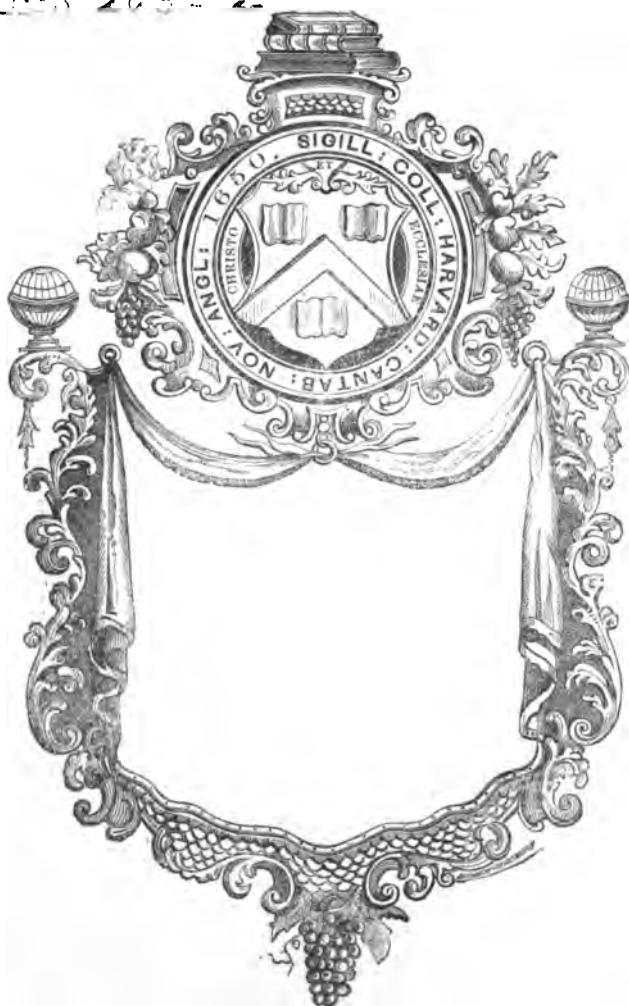
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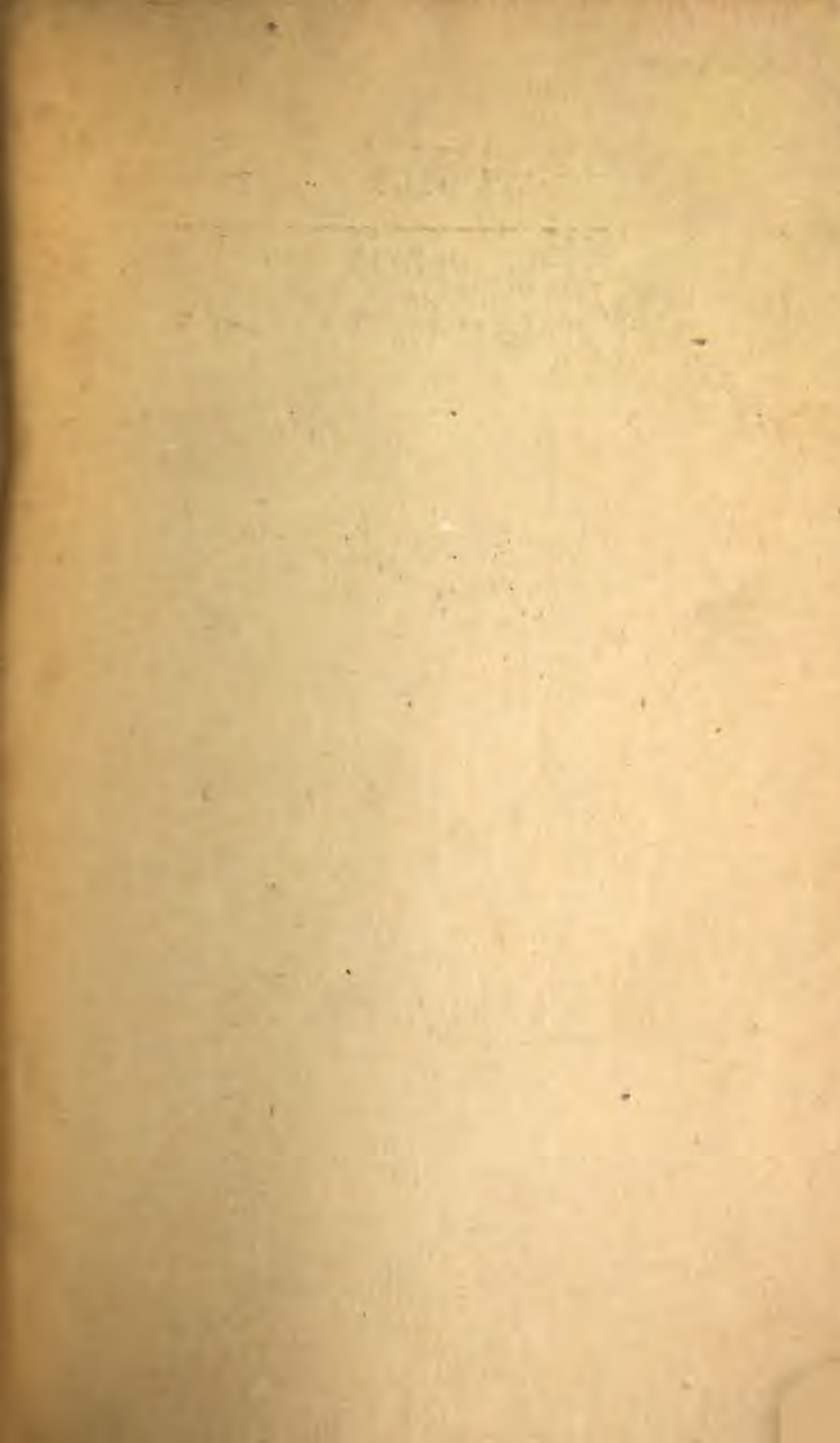
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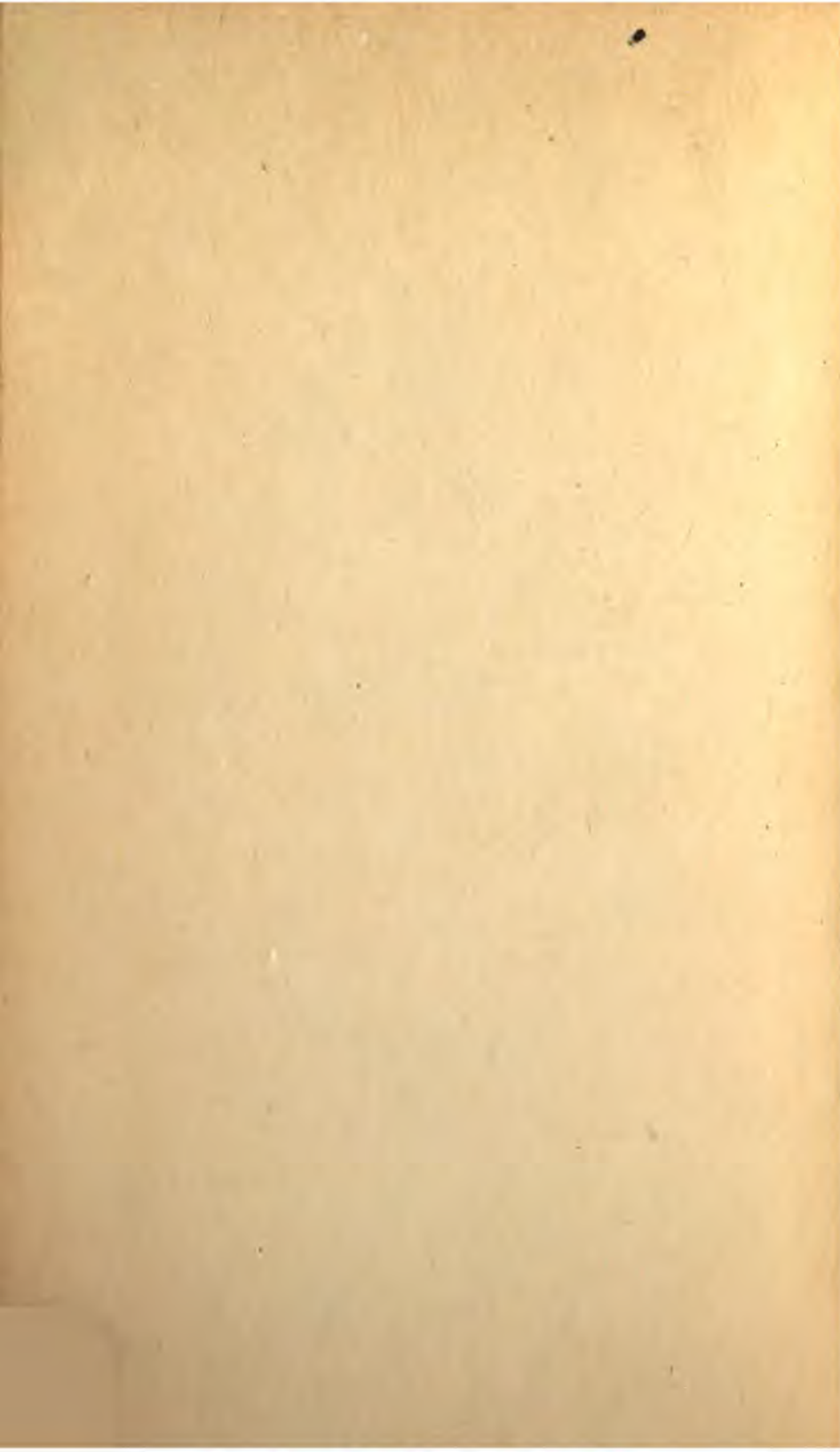




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**A NEW COLLECTION**  
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**LAWS, CHARTERS AND LOCAL ORDINANCES**

**OF THE GOVERNMENTS OF**

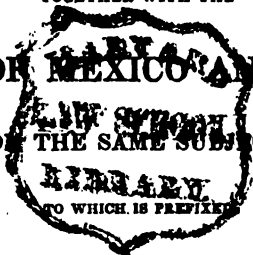
**GREAT BRITAIN, FRANCE AND SPAIN,**

**RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES;**

**TOGETHER WITH THE**

**LAWS OF MEXICO AND TEXAS**

**OF THE SAME SUBJECT.**



**JUDGE JOHNSON'S TRANSLATION OF AZO AND MANUEL'S**

**INSTITUTES OF THE CIVIL LAW OF SPAIN.**

---

**BY JOSEPH M. WHITE,**

**COUNSELLOR AT LAW, AND LATE DELEGATE IN THE CONGRESS OF THE UNITED STATES, AND  
HONORARY MEMBER OF THE GEORGIA HISTORICAL SOCIETY.**

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**IN TWO VOLUMES.—VOL. I.**

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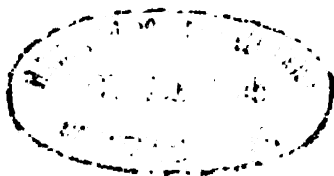
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**WHITE'S**  
**NEW RECOPIACION**  
**OF THE**  
**LAWS OF SPAIN AND THE INDIES,**  
**AND OF**  
**COLONIAL CHARTERS, COMMISSIONS, &c.**



## INTRODUCTION.

THE Compiler of this new translated Recopilacion of the Laws of Spain and the Indies, and of the Colonial Charters, and Local Ordinances of Great Britain, France and Spain, was engaged ten years since, by the government of the United States, at the suggestion of the late William Wirt, Esq. then Attorney General, to compile the laws, and provincial regulations of those kingdoms, relating to the concessions of lands within their respective dominions. That work, from the very scanty materials then at his command, and from the short period allowed by the President for its preparation, was necessarily deficient in matter, and limited in extent.

The copious notes and references, he had taken in the investigation of British and Spanish titles as a Commissioner of the United States, under the Florida Treaty, had placed at his disposal the means of embodying in a short time, for the immediate use of the government, the collection, such as it was, heretofore published under a Resolution of Congress in execution of the act of 1828.\* That small work, although it has been three times published by the government of the United States, is not now to be had in any of the bookstores of those States most deeply interested in the principles of law, upon which foreign provincial titles are founded, and the edicts and ordinances by which they are guarded and maintained.



The Compilation, limited as it was, from the circumstances indicated, has been almost the only book referred to in the Supreme Court, and the local tribunals, upon the many important questions, of complicated foreign law, and perplexed Spanish Colonial Jurisprudence.

It is a source of inexpressible gratification to the Compiler, that his work was favorably received and approved by the accomplished scholar and jurist, at whose suggestion, and under whose patronage it was undertaken. The commendation of Mr. Wirt, who added to lofty genius, the most accurate and profound legal learning, the compiler trusts may here be alluded to, as it affords at the same time, the happy occasion for the expression of the respect and admiration he had for his talents and character, as well as gratitude for his friendship.

It was also honored by the approbation of the late Chief Justice Marshall, whose fame is identified with all that is great and good in the Republic, and interwoven with its firmest and most lasting foundations. There is no branch of our national jurisprudence that has received more light from that splendid intellect, which with giant steps mounted to the sources of foreign law, and provincial authority, and expounded, in a masterly manner, the just interpretation of treaties. In the hands of that illustrious man, obscurity vanished from the most abstruse subject, and the rights of the humblest foreigner, protected by law, was secure, against the power and patronage of government, and questions were disposed of without regard to executive influence, legislative denunciation, or popular clamor.

It is a matter also of congratulation and encouragement, that in no one instance in Congress, or the courts, has the

impartiality of the work or the accuracy of the translation been questioned. The greatest care had been taken to avoid the one, or the other. The President, who was charged with the execution of the act of 1828, with that upright and conscientious feeling which always distinguishes the scholar and statesman, gave directions that the work should embrace every law, ordinance, and local regulation, in favor of, as well as against, the claimants to lands in those States and Territories, formerly composing the provinces of the crowns of Great Britain, France and Spain. The Compiler had been the commissioner, and was then the counsel of the government. He trusts that he would have been incapable of such a commission, if it had been desired, that it should have been executed differently. It is as much the duty of a great and magnanimous nation to protect the property of individuals unwillingly, in some instances, transferred with the soil, in the same treaty that invests the nation with the vacant public domain, and enforces the political obligation of recognising and confirming the private right. To avoid errors of translation from one language into another, especially of terms of art, and obscure maxims of colonial laws, he had the whole carefully revised, compared, and collated at the Department of State by the authorised translator of the government.

That nothing might be omitted in matter, deemed important, after all was selected that was considered applicable to the general object, the *Neuova Recopilacion de las leyes de las Indias*, with various other books, were submitted to his friend Col. Achille Murat, a civilian and scholar, well versed in the Spanish language, with a request that he would translate all such edicts, ordinances, cédulas, and

provisions relating in any manner to the land system of Spain, or the Indies, the organisation of tribunals, powers of officers, forms, and authentication of papers, which might have been overlooked or omitted.

This was executed in the most faithful manner, and his contributions again re-examined at the Department of State, and incorporated as part of the work.

Since the year 1829, when the connection of the Compiler with the government ceased, as commissioner and counsellor, he has been extensively engaged in the courts in cases arising under these laws, and has been induced to continue his researches in France and Spain, for all the commissions of Viceroy, Governors, and Captains General, Intendants, &c., together with the royal instructions from the parent governments from time to time, to their subordinate Tribunals, Intendants, and Governors.

The Supreme Court and Congress have, in the last ten years, disposed of a number of these cases, and established principles for the government of others. There are, however, numerous other original questions founded upon commissions, and authorities heretofore inaccessible to the government involving interests of great magnitude to the United States, and to individuals. The publication of this work will establish a fact, that the United States have given confirmation to titles of the value of more than ten millions of dollars, upon a report of a register and receiver in Louisiana which were not entitled to confirmation. Whether it is to confirm just titles, or reject defective ones, the United States, as a just government, are much more interested than individuals, in the administration of justice which separates private property from the public domain.

The want of this information has caused a delay in the adjustment of titles which could, under no other state of circumstances, excuse any government. It is now thirty years since many titles in Louisiana, Arkansas, and Missouri have been presented for confirmation. They have been delayed until the original grantees, and witnesses have died, and are now prosecuted with as much zeal, and as little progress as they were thirty years ago, by the heirs and legal representatives of the grantees. If the titles are valid, great injustice has been done to the owners; if not, the interests of the government have suffered, and the States in which such districts are reserved from sale, have cause of complaint against a delay that has produced great injury to them. Whether the title be good or bad, justice to the claimants, and to the United States, requires that they should be speedily decided. The postponement does not add to, or diminish their legal obligation, whilst the delay is ruinous to individuals, and prejudicial to the States. There is no power in the government to prevent a judicial investigation and decision. It may delay but cannot finally defeat it.

A number of important questions have been disposed of, but there are subordinate rights after the validity of an original grant has been adjudicated, of interest to individuals. These questions arise under the general laws of France and Spain, relating to persons and things, actions, descents, sales, curatorships, proofs, marriage rights, and prescription.

For Louisiana an act was passed soon after the cession to the United States authorising confirmation of titles, upon proof of ten years possession. It was more convenient for

individuals to make this proof than to exhibit French and Spanish grants. The titles have been so long in the process of adjustment, that now, when they are about to be surveyed, it is ascertained the lines of conterminous concessions conflict with each other, which must be decided upon principles of law, prescription, and constructive possession, regulated by the Codes then, and since adopted.

So far as these questions depend upon the laws of Spain, the Compiler has introduced in the first place the translation of Judge Johnson of Trinidad, of the Institutes of Aso, and Manuel. This work has been arranged after the model of Sir William Blackstone's Commentaries on the laws of England. These Institutes of the Civil laws of Spain have undergone six editions in the original at Madrid, and are directed by law 7, title 4, book 8, of the *Novissima Recopilacion*, to be read, and lectures delivered upon them in the Universities of Spain.

To the original Institutes have been added the Commentaries and notes of the learned Doctor of Laws, Don Joaquin Maria Palacios, Professor of the University of Heusca. These commentaries refer to the "*Leyes de Recopilacion*" of 1775, "*Febrero Adicionado*," published in 1818, and to the "*Novissima Recopilacion de las leyes de España*." The laws of the *Recopilacion* are referred to in the text as quoted, and in brackets [ ] those of the *Novissima*. It is declared in this new collection of the laws of Spain, and the Indies, that such laws of the old *Recopilacion* as are not inserted in the new, are not to be considered in force, and for that object the laws of the *Recopilacion* recited in the text, and not inserted in the table of the *Novissima Recopilacion*, are noticed in a note, so that a reference, and

medium are given of ascertaining what laws are now in force.

The Compiler does not deem it necessary to do more than to acknowledge his obligation to the learned Judge in Trinidad for incorporating his admirable translation in this collection. A small edition was printed in London, and is not now to be found in that metropolis, and few copies have been received in the United States. This portion of the work will be interesting to every scholar and Statesman, as well as to all students of the Civil law in the United States.

It will be of inestimable value to American merchants, and others having commercial connections, or other intercourse with South America, Mexico, and the Island of Cuba. There is a large capital invested by American industry and enterprise, in the commerce of the Pacific, Central America, and the Gulf of Mexico, and a considerable number of English and Americans are engaged in planting in the Island of Cuba. To all of these this collection must be of great value.

There is perhaps no country in the world where enlightened commentaries on the various Codes were more needed than in Spain. After the Saracen invasion from the 9th to the 14th centuries, there were no regular systems of government and jurisprudence. The Roman Civil Law which was the basis of all the modern Codes of Continental Europe was not much regarded, until the famous Compilation of Alfonso the Tenth was digested and arranged, founded principally upon its maxims. The Visigoths prohibited, under certain penalties, the use of the Roman laws as will be seen by the *Fuero Juzgo*, repeated in the *Fuero*

Real. The ancient *Fueros*, and the *Las Siete Partidas*, as well as such principles of the Roman Code as had been incorporated in the latter, were in a great measure, repeated by the *Neuva Recopilacion*.

There is an evident desire in some of the Spanish authors to leave the impression that their Codes have no connection with the Roman, and there are instances in which writers treat of the abuse of referring to foreign authors, or of quoting the civil, canon, or Roman laws.—Others treat the Roman as the common law of the Spanish monarchy.

At one time such was the confusion in the Codes of Castile, and the difficulties in their administration, that they were entirely abandoned, and the Roman law resorted to as the rule of decision.

In the midst of the confusion of the ancient kingdoms of Spain, and of its more modern *Recopilacions*, the work of Aso and Manuel, with the notes of Palacios, are indispensable in the establishment of the maxims and principles of Spanish law, and to the proper understanding of the old law, the mischief and the remedy, in this conflicting jurisprudence.

These Institutes are divided into three Books relating to persons, things, and actions. Under these comprehensive heads, the “*Ordinances Reales*” of Montalvo, the laws of Toro, and the more modern Codes, constituting the present laws of Spain, are treated of. These general principles bearing upon all the relations of Civil intercourse are the sources of authority, and individual right in the provinces.—They constitute the present law of Texas, in regard to sales, descents, inheritance, executorship, curatorship, proofs, marriage rights, and indeed, all the multiplied ramifications of



society. By the principles of International law, neither cession by treaty, nor revolution by force, affect the laws of *meum* and *tuum*. Political and military revolutions change jurisdiction and sovereignty, whilst the relations of individuals to each other remain the same.

The laws of Spain, therefore, modified by the laws of Mexico and Texas, so far as the Convention and Congress of the latter have acted by positive constitutional, or legislative enactments, are the present laws of that young and rapidly increasing Republic. Whatever changes in its political organisation or Civil Code, the wisdom of its rulers may prescribe, it is evident that their provisions must govern only the *lex fori*, as to all past transactions, whilst the *lex loci contractus* must govern the adjudications.

The Compiler admits, that he would not probably have been stimulated to the publication of a new compilation, but for the imperious necessity existing in that country for such a work. Taking a lively interest in the destinies of a young Republic, which seemed to promise so great an extension of human happiness, by the establishment of an empire upon the fairest portion of the North American continent, he deemed it an indispensable obligation to contribute his humble efforts to free it, in its infancy, from those evils and errors which a total ignorance of the laws, and the language in which they were written, would inevitably have entailed. No one is more sensible than himself, of the disadvantages, and prejudicial influences, in any country, of the uncertain and defective assurance of titles to property.

Of all the events of modern times, the revolution of Texas and its rapid progress to national greatness is perhaps the most extraordinary. It was anciently a part of

the province of Louisiana when the celebrated John Law, Controller General of France, projected the magnificent scheme of creating for that country, an empire in America from the Gulf of St. Lawrence to the Rio del Norte, and from the Mississippi to the Pacific, under the viceroyalties of New France, and Louisiana. It was afterwards without any distinct designation of limits feebly claimed as a part of those territories, upon which the proud monarchs of that once glorious, but now humbled monarchy of Spain, boasted that the sun never sat upon their dominions. It was marked off on the map of the Marquis Barbé Marbois, the Minister of Napoleon, as a part of the Louisiana cession to the United States in 1803, but abandoned in 1819, by fixing the southern limit of the United States at the River Sabine, and became a part of the unwieldy Mexican dominions, when that revolted viceroyalty had worried through an inglorious revolution. The first resistance of Mexico to Spain manifested itself when the mother country was desolated by Napoleon's army. In its origin and progress it was marked by that imbecility which has since characterised its mongrel population. The present republic of Texas, from the Sabine to the Rio del Norte, covers a country equal to that of all France, and in its geographical position, as well as climate, resembles, in all respects, upper Italy. It has been established as an independent government, by the valor of the Anglo-Saxon race. With a homogeneous population, and consolidated government, without any of those disturbing elements which occasionally threaten the North American Union, with the adjustment of titles, and assurances of property, which it is hoped this work will in some measure contribute to establish, it is destined to be the most perfect

in political institutions, beneficent in climate, and rich in agricultural products, upon this side of the Atlantic. To the work of Aso and Manuel, every chapter of which constitutes the *Corpus Juris Civilis* of Texas, there have been added various chapters from *Febrero*, *Curia Philipica*, and the *Novissima Recopilacion* in extenso.

There are added also some decrees of the Constitutional Cortes of Spain, which could not be annulled by the acts of Don Fernando Septimo, after his restoration, in consequence of the intervention of the revolution which placed Mexico beyond the reach of his authority. These decrees of the Extraordinary Cortes, passed at its first organisation in 1812, 1813, and 1814, and re-enacted in 1820, 1821, 1822, and 1823, have been published in Mexico as a part of the laws of the United Mexican States in 1828. To these have also been added the colonisation laws of Coahuila and Texas, and those relating to the colony of Stephen F. Austin, to whom the country is so much indebted as the most efficient promoter of its colonisation.

The fourth and fifth Books will contain the French Ordinances, for the government of New France, Louisiana, and the Illinois.

These papers have never before been published in the United States. They afford evidences of the local administration of the French colonies, and of their organisation of which we have no previous information.

They were obtained from Cartons, removed at the instance of the Compiler, by order of the Minister of the Marine and Colonies from the Palace of Versailles to Paris.

To the first collection has been added various orders,

and ordinances, general and local, obtained from France and Spain, relating to the subject.

As a matter of justice to the distinguished family, whose ancestors discovered the mouths of the Mississippi, and established the town of New Orleans, a short biographical sketch has been published, as materials for future history, and as a just tribute to the gallantry and enterprise of the French nation.

The Compiler has obtained from E. Mazereau, Esq., one of the most eminent jurisconsults in the United States, a discourse upon the life and character of a distinguished Judge of the Supreme Court of Louisiana, which he has added to the appendix, with certain legal opinions connected with the subjects of the book, which he is sure will be read, by all who will have occasion to refer to it, with interest and profit.

Upon such an abstruse subject as that of the colonial systems, and policy of these governments, he feels himself authorised to incorporate every thing in the form of laws and commentaries, with a view to their concentration into a connected form. For this purpose he has published all the correspondence, preceding the secret treaty of 1762, and the definitive treaty of 1763 which in a great measure quieted the claims of the European powers to colonial aggrandisement in America, by a final adjustment of their relative and conflicting pretensions. To these have also been added the secret treaty of San Ildefonso of 1800, by which Louisiana was ceded by Spain to France, and the negotiations which preceded and followed that convention up to the delivery of the country to the United States in 1803.

The several acts of Congress relating to the adjustment of land titles in Louisiana, Missouri and Florida, have been incorporated at the request of the members of the Bar of those States and Territory.

The laws of the United States are almost as difficult to be found, and examined in these States as those which the cruelty of a Roman Emperor placed so high that his subjects could not read, or comprehend them.

The Compiler believes that every thing in the form of general law, local ordinance, treaties, charters, commissions, correspondence, official reports, calculated to illustrate the land systems of Great Britain, France and Spain, and of their colonies have here been incorporated, and if it furnishes any rules by which the respective rights of the government and its citizens shall be safely, legally, and justly decided, the labor and expense bestowed upon it will be rewarded by the recollection of having done something useful to his country, and beneficial to his fellow citizens.

JOSEPH M. WHITE.



# INSTITUTES

OF THE

## CIVIL LAW OF SPAIN.

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### BOOK I.

#### TITLE I.

##### OF PERSONS IN THEIR NATURAL STATE OR CONDITION.

**CAP. 1.** IT being necessary to divide this work into three \*[ 1 ] books, in conformity with the order of the three objects of law, which are persons, things, and actions, we must, in this first book, which relates to persons, treat, before all things, of their state or condition. A person is man, considered with reference to his state; wherefore it is said that there cannot be a person, unless he be considered in one state or the other.

State is the condition or manner in which men live, or exist, L. 1. tit. 23. P. 4. [L. 1. tit. 23. P. 4.] The variety of conditions arises from the nature or from the will of men: hence the state of men is divided into natural and civil.

§ 1. According to their natural state, men are either to be born,<sup>1</sup> or are actually born. With respect to the former, through humanity, it is established that when what is done is in their favor<sup>2</sup> it availeth or advantageth them as though they were born, L. 3. tit. 23. P. 4. [L. 3. tit. 23. P. 4.]

From this principle of law it follows, 1st, That those to be born (or in ventre) may retain or preserve all their rights without any damage or prejudice until the time of their birth, *Lara, Compen-* [ 2 ]

\* The side folios refer to the original paging of the works reprinted.

<sup>1</sup> i. e. in ventre of the mother.

<sup>2</sup> On the contrary, what is said or done to the injury of their persons, or property, shall not prejudice them. *Vide* L. 3. tit. 23. P. 4.



*dium Vitæ Hominis*, c. 1. n. 4. 2d, That this privilege of law takes effect only when the person to be born shall come forth from the womb of his mother alive and perfect, L. 2. tit. 8. L. 5. Rec. [L. 2. tit. 5. Lib. 10. Nov. Rec.] 3d, That the person not yet born is considered part of the mother, in as far as it produces benefit to it: wherefore 4th, Any capital punishment, torment, or other punishment to which a pregnant woman is condemned, is deferred until she bring forth, L. 3. tit. 23. P. 4. [L. 3. tit. 23. P. 4.] 5th, That if any one is interested in the inheritance or succession of a person not born, he may place a watch<sup>3</sup> or guard on the pregnant woman, and the birth or delivery ought to be made known to the party so interested, L. 17. tit. 6. P. 6. [L. 17. tit. 6. P. 6.] 6th, That if the king die and the queen be left pregnant, homage or service is to be done in the name of the unborn successor, *Gregorio Lopez on Law 5. tit. 15. P. 2. Gl. 1.* [L. 5. tit. 15. P. 2. Gl. 1.] Finally, many are the effects or purposes for which persons are considered born, who are still in ventre of their mother, but being foreign to the subject of this chapter, reference may be had to *Laru*, c. 4. before quoted.

Persons actually born, are those who have come forth from the womb (*ventre*) of their mother alive. Hence, it is inferred, 1st, That those deserve not this name who are born or taken from the womb (*ventre*) of their mother without human shape or form, called monsters, L. 5. tit. 23. P. 4. [L. 5. tit. 23. P. 4.] 2d, These monsters are not ranked in the number of children, but are considered as dead, L. 5. tit. 23. P. 4. [L. 5. tit. 23. P. 4.] 3d, That those who are born with a human form, although they may have a defect in some limb or part of the body, are considered as persons, L. 5. tit. 23. P. 4. [L. 5. tit. 23. P. 4.] 4th, That of two born at the same time, the male is presumed born before the female; and if both are males, and it does not appear who is first born, the inheritance is equally divided between them, L. 12. tit. 33. P. 7. [L. 12. tit. 33. P. 7.] 5th, That in order for the child (*feto*) to be considered natural and capable of inheriting, and for other legal purposes, it is required that when it is born, it be altogether alive; that it be born in lawful time, which is declared by L. 4. tit. 23. P. 4. [L. 4. tit. 23. P. 4.] to be the seventh, ninth, or tenth month, and not the eighth<sup>4</sup> or eleventh; that it live twenty-four hours, and that it be baptized, L. 2. tit. 8. L. 5. Rec. [L. 2. tit. 5. lib. 10. Nov. Rec.] The posthumous<sup>5</sup> child is that born after the death of the father, L. 20. tit. 1. P. 6. [L. 20. tit. 1. P. 6.]

§ 2. Mankind, in the second place, are born either males or [ 3 ] females; and though in case of doubt their rights are equal, yet, as our laws conform themselves to that which generally happens, wis-

<sup>3</sup> See the further restraints, &c., which may be imposed on a woman in this situation, under L. 17. tit. 6. P. 6.; and vide 1 *Blac. Com. Laws of Eng.* p. 456. 15th Ed.

<sup>4</sup> *Palacios* justly observes, that L. 4. tit. 23. P. 4. implies legitimacy of birth also in the 8th month. Vide *Greg. Lop. Gl. 2. ibid.*

<sup>5</sup> This term is also extended to the child born after the father has made his last will. Vide L. 20. tit. 1. P. 6.

dom being possessed in a greater degree by men, and women being by nature more frail, it hence follows, that the condition of the former is better than that of the latter with respect to many things,<sup>6</sup> L. 2 tit. 23. P. 4. *Vela, disert.* 4. n. 4. y. n. 88. [L. 2. tit. 23. P. 4.]

From this axiom, we deduce, 1st, That men only, to the exclusion of women, can obtain public employments and offices, as is inferred from the reason given by L. 4. tit. 4. P. 3. [L. 4. tit. 4. P. 3.] for excluding the latter from the office of judge, unless they have the seignory over vassals.<sup>7</sup> 2d, That ignorance of law does not, in many instances, prejudice woman,<sup>8</sup> Ll. 31. tit. 14. P. 5. and 21. tit. 1. P. 1. [Ll. 31. tit. 14. P. 5. and 21. tit. 1. P. 1.] 3d, That the hermaphrodite enjoys the rights belonging to that sex which shall most prevail.

§ 3. In the third place, men are of full age, *i. e.* above the age of twenty-five years, or minors. The latter are so considered with respect to the period preceding and succeeding puberty, which, with regard to males, begins at the age of fourteen, and with respect to females, at the age of twelve, Ll. 12. and 21. tit. 16. P. 6. [Ll. 12. and 21. tit. 16. P. 6.] Before the age of puberty, they are called pupils, L. 4. tit. 11. P. 5. [L. 4. tit. 11. P. 5.]; and in this age, a distinction must be made with respect to infancy, which continues until seven, L. 1. tit. 7. P. 2.; L. 4. tit. 16. P. 4. [L. 1. tit. 7. P. 2. and L. 4. tit. 16. P. 4.] From this age to ten and a half, both males and females are said to be near infancy, and then they are not subject to punishment, L. 8. tit. 31. P. 7. and L. 8. tit. 9. P. 7. [L. 8. tit. 31. P. 7. and L. 8. tit. 9. P. 7.] From this period (ten and a half) to that of puberty,<sup>9</sup> they are said to be near or approaching to puberty, and are considered capable of dole (*dolo*) and malice, and consequently are subject or liable to punishment,<sup>10</sup> L. 6. tit. 5.; L. 2. tit. 7.; and L. 4. tit. 19. P. 6.; [L. 6. tit. 5. P. 6.; L. 2. tit. 7. and L. 4. tit. 19. P. 6.;] and L. 17. tit. 14. P. 7., [L. 17. tit. 14. P. 7.] and other laws.

The obligation of providing aliment<sup>11</sup> for the issue attaches, for

<sup>6</sup> The law quoted in the text, L. 2. tit. 23. P. 4. does not specify or particularise them.

<sup>7</sup> The queen, &c. may; but then such women must exercise the office by a council of wise men, as stated in the law quoted in the text.

<sup>8</sup> L. 3. tit. 14. P. 5. Women come under the benefit of the exception of this law, which deprives others of the right to recover back a legacy paid under an invalid will, on the alleged plea of ignorance of the legal imperfection, or defect of the will. But L. 21. tit. 1. P. 1. limits the benefit of the plea of ignorance of law to simple countrywomen. And *Greg. Lop.* Gl. 10. on this law, says, that regularly this plea does not excuse women. And see in support of this dictum of the learned commentator, L. 1. tit. 2. lib. 3. Nov. Rec. [L. 1. tit. 1. lib. 2. Rec.]

<sup>9</sup> Near puberty, is 6 months therefrom. *Vide Greg. Lop.* Gl. 5. L. 9. tit. 1. p. 7.

<sup>10</sup> But to a lesser punishment than persons exceeding 17 years; for until this age, the punishment is mitigated in proportion to the age and malice of the offender. *Palacios*, N. 1. referring to L. 8. tit. 31. P. 7.; and L. 9. tit. 11. Lib. 8.; and auto 19, tit. 11. Lib. 8. Rec. [Ll. 2. and 3 tit. 14. Lib. 12. Nov. Rec.]

The concluding part of L. 8. tit. 31. P. 7. gives rather a wide discretion to the judge—the power, on mature consideration of the circumstances of the case, of augmenting, diminishing, or remitting the punishment.

<sup>11</sup> This word aliment includes all sorts of necessities and education suitable to property and rank. *Vide Teatro de la Leg.* tit. *Alimentos*.

the first three years of childhood, to the mother. From this period to twenty-five years of age, this duty devolves upon the father, who is also obliged to afford them suitable education,<sup>13</sup> Ll. 2. and 3. tit. 19. P. 4., [Ll. 2. and 3. tit. 19.] except they prove ungrateful to their [4] father, or have sufficient means of their own, L. 6. tit. 19. P. 4. [L. 6. tit. 19. P. 4.] But if the mother be poor, the father is obliged to provide necessaries to rear the children.<sup>13</sup>

In case of lawful divorce, the party on whose account it took place, must provide aliment out of his or her particular means for the children; and the care or charge of them devolves to the parent whose conduct did not give rise to the divorce,<sup>14</sup> L. 3. tit. 19. P. 4. [L. 3. tit. 19. P. 4.]

Poverty furnishes an exemption or excuse to the parents from providing aliment for their children, in which case the obligation attaches to the grandparents, provided they have the means,<sup>15</sup> L. 4. tit. 19. P. 4. [L. 4. tit. 19. P. 4.]

This obligation extends or applies to the case of natural children, with some limitation as to those begotten in adultery and incest; the charge of bringing up whom attaches alone to the relations by the mother's side,<sup>16</sup> as being evidently hers, and not the father's, L. 5. tit. 19. P. 4. [L. 5. tit. 19. P. 4.]

Lastly, the minority of both males and females continues from puberty to the age of twenty-five, Ll. 4. and 5. tit. 11. P. 5.; L. 2. tit. 19. P. 6. [Ll. 4. and 5. tit. 11. P. 5. and L. 2. tit. 19. P. 6.]

It must be observed, that persons under eighteen cannot exercise any offices in towns,<sup>17</sup> nor till then are they liable to serve in the

<sup>13</sup> *Palacios* says, that the father is not bound to furnish aliment to his child until the age of 25, and that the laws cited in the text do not determine this, nor any other age; but that, on the contrary, L. 6. tit. 19. P. 4., as also the text, states that the father is released from this obligation when the son has wherewithal to maintain himself; or is able to earn, decently, his livelihood; or affords grounds of its discharge on the part of his father, as in the case of ingratitude.

<sup>13</sup> And equally so is the mother, in case the father be poor. *Palacios*, referring to L. 4. tit. 19. P. 4.

<sup>14</sup> But if the mother, having the guardianship of the children on such account, should marry again, she is no longer entitled to have the care of them; nor is the father bound to make her any allowance on this account, but should then take the children under his charge, and provide for their support, &c., if he has the means. And with reference to the rule in the text, it must be observed, that if that parent whose conduct gave cause to the divorce be poor, and the other be rich, the latter must provide for the support of the children. *Palacios*, who cites L. 4. tit. 19. P. 4.

<sup>15</sup> Children and grandchildren are equally obliged to maintain their parents and grandparents, if they should be reduced to poverty, inasmuch as this is a natural and reciprocal obligation between ascendants and descendants. *Palacios*, referring to the beginning of tit. 19. p. 4.

<sup>16</sup> By relations, (observes *Palacios*,) must be understood here the ascendants by the right or direct line. L. 5. tit. 19. P. 4.

<sup>17</sup> It must not be hence inferred, that at 18 years of age persons are eligible to all public offices or employments. A person must be above 20, who is appointed to the situation of an ordinary judge (*juez ordinario*), L. 3. tit. 9. lib. 3. Rec. (L. 3. tit. 1. lib. 11. Nov. Rec.); and advocates (*letrados*) cannot exercise any judicial office or employment, nor that of coroner (*pesquisidor*), nor of relator, until the age of 26, L. 2. tit. 9. Lib. 3. Rec. [L. 6. tit. 1. lib. 11. Nov. Rec.] No one can be an escribano, until he hath completed 25 years, L.

militia<sup>18</sup> according to the *Ordenanzas de Quintas de 16 de Noviembre de 1761*.

§ 4. In the fourth place persons above twenty-five years of age are either young or old. Youth begins at twenty-five, and continues to fifty in men, and forty in women, according to a decision of *Narbona Annales Juris* an. 50. quæst. 1. At the ages of fifty and forty, according to the respective sexes, old age begins, an age to which respect is due, and many privileges belong, which are fully treated of in *Lara*, c. 30.,<sup>19</sup> and which shall be noticed in their proper places, it being enough to observe in this place, that the age of forty exempts from military service according to the *Ordenanza de 1761*, before cited.

30. tit. 25. lib. 4. Rec. [L. 2. tit. 15. lib. 7. Nov. Rec.], nor can one be an attorney at law, or judicial attorney (*procurador a pleytos*), until 25, L. 5. tit. 4. P. 3. *Palacios* (1).

<sup>18</sup> The ordinance of 27th October, 1800, for recruiting the army, declares them fit from the completion of 17, to the completion of 36 years. But in respect to the balloting for every fifth man (*quintas*), the ordinance or rule which is made or published on the occasion, must be the guide in such case. The general ordinances of the army make persons liable to serve from 16 to 40 years of age, in time of peace; and, in time of war, from 18 to 40. *Palacios* (2).

<sup>19</sup> Cap. 31. according to *Palacios*.

## TITLE II.

## OF THE GUARDIANSHIP OR TUTELAGE AND CURATORSHIP.

[ 6 ] THE third division which we have made of persons, according to their natural state, into minors and majors, leads us here to treat of guardianship and curatorship, as peculiar or belonging to these ages.

Cap. 1. Guardianship is the protection which is given and afforded to the free male orphan under fourteen years of age, and female under twelve, who cannot protect themselves, L. 1. tit. 16. P. 6. [L. 1. tit. 16. P. 6.] Whence it follows that guardianship or tutelage is the same as protection, and tutor the same as guardian of an orphan. By orphan is understood, one who has no father, with the difference that, formerly, this appellation was given only to those who were without father or mother until they reached the age of fourteen, as laid down in L. 1. tit. 3. lib. 4. *Fuero Juzgo*.

§ 1. It is certain that the supreme guardianship, or care of orphans, is centered in our kings, and their magistrates, who have wished to take them under their favor, care, and protection, as appears clearly from L. 14. tit. 18. P. 3., [L. 14. tit. 18. P. 3.,] and from L. 20. tit. 23. P. 3. [L. 20. tit. 23. P. 3.] Hence arises, no doubt, their so great [ 6 ] vigilance and intervention in the nomination, approval, and removal of guardians; the power being vested in the magistrate, who supplies the place of the sovereign, of removing from the guardianship the negligent, suspected, and bad guardian, merely by virtue of his office, and private inquiry, although no accusation shall have been made against the guardian by the party interested, L. 3. tit. 18. P. 6. [L. 3. tit. 18. P. 6.] Hence it also follows, that their causes are privileged, and are cases of court (*casos de corte*), L. 8. tit. 3. L. 4. Rec. [L. 9. tit. 4. Lib. 11. Nov. Rec.]

From which we must not suppose that guardians possess that power and absolute dominion which the laws of Rome gave them;<sup>1</sup>

<sup>1</sup> The Roman laws did not grant this absolute dominion to guardians; but, on the contrary, the want of it was what more distinguished the power of guardian from that of the lord or master and of the father. The end of guardianship, and the office of the guardian, was among the Romans, as amongst us, to defend or protect the ward. For his benefit was the guardianship only established, and to his advantage was it only to be directed. *Vinnius Com. § 1. Inst de Tut.* The very words of the definition of the Roman guardianship, which are conformable in every respect to ours, L. 1. tit. 16. P. 6. declare sufficiently what was the office, and what the power of the Roman guardians; to *defend* or *protect* the *ward*, says § 1. cited. The power of the father (*patria potestas*) was established for the benefit of the father; and that of the lord (*dominica*) for the benefit of the lord; and for this the one was as great as the other. In fine, it may be said that our laws, in the matter of guardianship, as in many others, did no more than copy the laws of the Romans. *Palacios* (1).

by reason of guardianship not being, among us, a form and imitation of the lofty description or character of the *Patria Potestas*, which fathers enjoyed with respect to their children, but rather a protection of the minor, exercised by guardians in the name of the sovereign, or magistrate, to whom is committed the care of orphans.

§ 2. The privileges of guardianship among us are founded on the laws quoted, which place it in a somewhat different light from that in which the Romans considered it according to their laws. This clear conception in conformity with our laws, causes us to understand, 1st, The reason that no guardian, with the exception of the one named or appointed by the father, can exercise the office of guardian without the intervention of the decree of a judge for that purpose, L. 6. and 8. tit. 16. P. 6. [L. 6. and 8. tit. 16. P. 6.] 2d, Why the confirmation of the guardianship only serves to approve of, and give authority to the guardian, and not to supply his defects. 3d, Why the orphan is obliged to reverence the guardian, as a person who represents the magistrate, in whose name he exercises the guardianship. 4th, Why the office of guardianship is a manly, public, and personal employment. 5th, Why, in the nomination or appointment of guardian, attention is only had to the benefit and advantage of the ward.

§ 3. From the definition of guardianship it follows, 1st, That the guardian is given principally for the protection or care of the person of the orphan, and consequently for that of his property, L. 1. tit. 16. P. 6. [L. 1. tit. 16. P. 6.] 2d, That the guardian is only given to the male minor of fourteen years, and female of twelve. Same law. 3d, That these minors may have a guardian appointed, although they may not pray for nor wish it. Same law. 4th, That guardian is only given to the orphan or fatherless minor. Same law.

§ 4. Guardianship being a manly, public, and personal employment, 1st, Persons under twenty-five years cannot be guardians,<sup>2</sup> L. 4. tit. 16. P. 6. [L. 4. tit. 16. P. 6.] Since L. 1. tit. 7. lib. 3. del *Feuro Real*, which mentions twenty years, does not govern in this case. 2d, Nor can the dumb, deaf, idiots, persons deprived of memory, (*desmemoriados*) prodigals, bishops, monks, and religious persons (*religiosos*) be guardians, L. 4. and 14. tit. 16. P. 6. [L. 4. and 14. tit. 16. P. 6.] But if the clergy are relations of the pupil or minor, and pray the appointment within four months, they are eligible, L. 14. tit. 16. P. 6. [L. 14. tit. 16. P. 6.] 3d, Women are also excluded from this office, except those whose great affection for the minor may supply the vice or defect of their sex, such as the mother and grandmother,<sup>3</sup> L. 4. tit. 16. P. 6. [L. 4. tit. 16. P. 6.]

Cap. 2. The advantage and benefit of the minor being looked to

<sup>2</sup> It should be observed, that persons under 25 years of age can be appointed by testament, guardians, although they cannot exercise the office of guardian until they attain that age. *Palacios* (1) referring to L. 7. tit. 16. p. 6.

<sup>3</sup> If they remain widows, or do not marry again, *vide* p. 8. post of the text, and 9. of the translation; as also L. 4. and 5. tit. 16. P. 6.

in the nomination of guardian, our legislators considered it right that the express will or desire of a testator in the nomination of a guardian for the minor, whom he instituted or appointed his heir, should have the force of law;<sup>4</sup> because they naturally concluded that no one would have greater consideration for the minor, and the property he bequeathed to him, than the testator himself. But as it often happens that these testamentary nominations or appointments are wanting, they determined that in this case the nearest relation had a right to be the guardian of the minor, supposing him to possess all that affection which is more natural in a relation than in a stranger. Lastly, in the absence of such parental testamentary nomination, and of relations, it rests in the discretion of the magistrate to nominate a stranger to be guardian, being a good trust-worthy man. Hence, therefore, arise the three kinds of guardians known among the Romans, and adopted by our laws, viz. testamentary, lawful, and dative, or judicially assigned (*dativo*), spoken of by L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.]

§ 1. As the foundation of testamentary guardianship, is that affection which is supposed to actuate the testator, it is inferred—1st, That the father can appoint a guardian, not only for the child already born, but also for that to be born, L. 3. tit. 16. P. 6. [L. 3. tit. 16. P. 6.] And it is astonishing that in the teeth of a law so clear, *Vela, disert.* 1. n. 48., should assert the contrary, founding his allegation of texts [ 8 ] of Roman law<sup>5</sup> which are of no force in these kingdoms. 2d, That the grandfather may also appoint a guardian for his grandson, provided that the latter does not fall under the power of the father,<sup>6</sup> L. 3. tit. 16. P. 6. [L. 3. tit. 16. P. 6.] 3d, That the mother may also do the same when her children are without father, and she appoints them her heirs, but not otherwise; however if she does name a guardian, he shall be considered and admitted as a testamentary guardian, if the judge will confirm the appointment,<sup>7</sup> L. 6. tit. 16. P. 6.

<sup>4</sup> In this sense, *Palacios* observes,—the text gives us to understand that the express will of the testator would not constitute law, unless the father should institute him heir. But he adds, that if a father should appoint a guardian to his son, the appointment would be valid, although he should disinherit his son, § fin. *Inst. de Tut.*; for that this nomination does not depend upon the fact of institution, or disinherison, but on the power of the father (*patria potestas*), and he refers to L. 3. tit. 16. p. 6.

<sup>5</sup> By the Roman Law, a guardian might be appointed to a posthumous son, as well as to one already in existence; and to such a degree does the Roman law agree with ours in this respect, that it may be said our law is taken from § 4. *Inst. de Tut.*, and from L. 1. *de Testament. Tut. Palacios* (3).

<sup>6</sup> One of the conditions requisite to authorise the nomination of a guardian by testament is, that the ward (*pupilo*) be in the power of him who appoints, L. 3. tit. 16. P. 6. And as the married son passes by the act of marriage from the power of the father, L. 8. tit. 1. lib. 5. Rec. [L. 3. tit. 5. lib. 10. Nov. Rec.] the grandfather, therefore, cannot appoint a guardian by testament to his grandchild, except in the case where his father shall not have been married (*velado*). *Palacios* (4). This exception does not appear very intelligible. The word "*velado*" may, however, have some other meaning than the sense in which it is here translated.

<sup>7</sup> As well, (*Palacios*), in the case in which she may institute them her heirs, as that in which she may not, although she might leave them part of her property, would the

[L. 6. tit. 16. P. 6.] 4th, That the father may appoint a guardian for his natural child,\* who must, however, be confirmed or approved of by the judge, L. 8. tit. 16. P. 6. [L. 8. tit. 16. P. 6.] 5th, That the testamentary guardian must be named with certainty and individuality of person; because, 6th, If a person be named as a guardian, whose name is common to another, unless there be certain proof which of them the testator intended, neither shall be guardian, L. 7. tit. 16. P. 6. [L. 7. tit. 16. P. 6.] 7th, That the testamentary guardian may be appointed conditionally, for a certain or specified time, and simply or absolutely; in which cases the will of the testator must be invariably complied with, L. 8. tit. 16. P. 6. [L. 8. tit. 16. P. 6.]

As testamentary guardianship in so much or so far subsists as it is beneficial and useful to the minor, it follows, that if the mother or grandmother be named guardian, by will of the father, they may act, provided they do not marry a second time, and that they renounce whatever rights may be favorable to them and prejudicial to the orphan, which is founded on the presumption that the woman, in desiring another marriage, has placed her affection on the husband and not on her child, on account of her love of whom, she was admitted to the guardianship, Ll. 4. and 5 tit. 16. P. 6. [Ll. 4. and 5. tit. 16. P. 6.]

§ 2. We have said, that in default of a testamentary guardian the nearest relations of the minor succeed by law to the guardianship, which forms the second species of guardianship; called lawful: whence it arises, 1st, That this right proceeds from the nearest degree of consanguinity with the orphan; and thus the nearest of kin (*parentesco*) ought to be preferred; and in default of such, he who immediately succeeds him in this consanguinity, L. 9. tit. 16. P. 6.; [L. 9. tit. 16. P. 7.]; because, 2d, Lawful guardianship follows the laws of succession or inheritance, which will be hereinafter set forth. Hence it is that, 3d, The mother is the first entitled to this right, and in default of her, the grandmother; and in default of both, or in [ 9 ] case of their unwillingness to accept, the nearest relation (*pariente*) L. 9. tit. 16. P. 6. [L. 9. tit. 16. P. 6.] with this difference, that by L. 3. tit. 3. lib. 4. del *Fuero Juzgo*, the mother was first entitled, and in case she married, then the elder brother of the minor, on his attaining the age of twenty, in default of whom the paternal uncle entered on the guardianship, from whom it passed to his son, finishing with those related by blood to the minor.

mother's nomination require the confirmation of the judge; but with this difference, that in the first case, the judge must, necessarily, confirm; but in the second not, L. 6. tit. 16. P. 6. He adds, that the confirmation of the judge is necessary in either case, because the mother is not invested with the power of the father (*patria potestad*) over her children, from which, as has been observed, arises the right to appoint a testamentary guardian.

\* If he institute him heir, the same, as we shall say, in the case in which any other person should institute a stranger his heir, and appoint a guardian for him, L. 8. tit. 16. P. 6. *Palacios* (6).



The above L. 9. tit. 16. P. 6. [L. 9. tit. 16. P. 6.] having given the preference of lawful guardianship to the mother and grandmother, it is clear that there was no foundation for the establishment by *Gutierrez* of a fourth species of guardianship, as exercised by the mother and grandmother.<sup>9</sup> See his treatise *De Tutelis and Curis*, Part 1. cap. 8. 4th, If there be many or several relations of the minor in the same degree of consanguinity, all shall be guardians, L. 11. tit. 16. P. 6., [L. 11. tit. 16. P. 6.] and shall administer, as will be spoken of in the following chapter.

The lawful guardianship of patrons is not now recognised or known.

§ 3. In order that the judge may proceed to the appointment of a *dativo* guardian with due cognisance (*conocimiento*), and may have regard to the best interest of the minor, it has been established, 1st, That regularly a petition shall precede this appointment. 2d, That not every judge can make it. 3d, That the appointment of this description of guardian takes place only in default of a testamentary or lawful guardian, L. 2. and 12. tit. 16. P. 6. [L. 2. and 12. tit. 16. P. 6.]

The presentation of a petition to the judge for the nomination of a guardian being previously required, it results, 1st, that the nearest relations ought, in the first place, to petition for it; and failing to do it they lose the right of succession or inheritance, which they may possess, to the property of the minor, L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.] 2d, That in default of these, the friends of the minor shall petition; and in default of all such, any inhabitant of the place, L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.] 3d, That when no one shall do this, and the judge have information that the minor is without protection, he ought officially, and in virtue of the power committed to him, to appoint a guardian. As every judge cannot appoint a guardian, it must be observed: 1st, That competent judges only can do so, such as those who reside or have jurisdiction in the domicile of the minor, or in the birthplace of himself or his father, or in the place [ 10 ] where the greatest part of the real property of the minor is, L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.]; and except these, no judge can appoint a guardian, *Gutierrez de Tut. et Cur.* Part 1. cap. 16. 2d, That if it shall happen that the three above-mentioned judges shall appoint a guardian, the first named shall act; but if the appointment has taken place in the same day, and the precedence cannot be ascertained, then the appointment by the judge of the domicile of the minor shall take effect or be valid.<sup>10</sup> This is con-  
 jec-

<sup>9</sup> The mother and grandmother cannot be compelled to take upon themselves this guardianship; with the difference, that the collateral relations may be according to their greater proximity. For this reason, the guardianship of the mother and grandmother is termed *irregular, anonymous, and extraordinary*, as hath been already observed by *Febrero*, (*Reformado*), P. 2. Lib. 1. cap. 1. § 2. num. 54. *Palacios* (1).

<sup>10</sup> But the practice is, for the appointment of the guardian to be made in the place where the execution or the administration of the testament (*testamentaria*) is established. *Febrero* (*Reformado*) P. 2. Lib. 1. c. 1. § 2. num. 57. *Palacios* (2).

tured from the order in which these judges are named in L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.] quoted. See *Gregorio Lopez* in his comment 13 on this law.<sup>11</sup> 3d, That this nomination belongs to the senior or superior judge who may delegate it to the inferior judge when the property of the minor does not exceed in value five hundred maravedis,<sup>12</sup> L. 12. tit. 16. P. 6. 4th, That the nomination of guardian for the orphan of a grandee or nobleman (*grande*) belongs to the king, or the magistrate to whom he shall grant a particular commission for the purpose, L. 14. tit. 5. lib. 2. Rec.. [L. 17. tit. 1. lib. 6. Nov. Rec.]

The administrative or judicially nominated guardian being the one appointed in default of the testamentary or lawful, it follows, 1st, That by reason of the temporary absence or incapacity alone of the testamentary or lawful guardian, a curator or administrator, and not a guardian, is so appointed, L. 13. tit. 16. P. 6. ad. fin. [L. 13. tit. 16. P. 6. ad. fin.]; and 2d. That his appointment only continues until the age of fourteen of a male and twelve of a female minor, L. 12. tit. 16. P. 6. [L. 12. tit. 16. P. 6.] See the formule of this appointment in L. 94. tit. 18. P. 3. [L. 94. tit. 18. P. 3.]

The confirmation or decree of the judge for the administration and care of the person of the minor (*pupilo*) is necessary to the exercise of the office by either of these three kinds of guardians, as appears by Ll. 4. 6. and 8. tit. 16. P. 6. [Ll. 4. 6. and 8. tit. 16. P. 6.] and if L. 3. tit. 16. P. 6. [L. 3. tit. 16. P. 6.] seems to except from this general rule the guardian named by the father, by making no mention of such decree, it is to be presumed that a father will select a fit and qualified person, to whom he commits the charge of the person and property of his lawful child.

Cap. 3. Curator is he who is appointed as guardian of those above fourteen and under twenty-five years of age, being of sane mind, and even of those above twenty-five, who are insane or deprived of sense (*desmemoriados*), L. 13. tit. 16. P. 6. [L. 13. tit. 16 P. 6.] which definition ought to be extended to prodigals or spendthrifts, who are considered insane or foolish by reason of their bad [ 11 ] conduct.

Many of the things which we have before mentioned with respect to guardians, must be understood to apply to curators; we shall therefore proceed to notice the following differences. 1st, That males above fourteen and females above twelve years of age cannot be compelled to receive a curator against their will, except it be with respect to law suits, L. 13. tit. 16. P. 6. [L. 13. tit. 16. P. 6.] 2d, That a curator ought not to be appointed by last will or testament; and if he be, his confirmation by the judge will be necessary, L. 13. tit. 16. P. 6. [L. 13. tit. 16. P. 6.] 3d, That there is no *lawful*

<sup>11</sup> *Gregorio Lopez* says there, the judge of the minor's birth-place; but I am of opinion that the judge of the minor's domicile is preferred. *Palacios* (3).

<sup>12</sup> "Of gold" is understood. *Palacios* (4).

(*legitima*), curatorship with respect to madmen,<sup>13</sup> according to *Lopez* in his *Gl. 2. on L. 2. tit. 16. P. 6.* [L. 2. tit. 16. P. 6. Gl. 2.] 4th, That the curator is appointed in the first place for the care of the property, and consequently of the person of the minor, *Lopez, Gl. 2. on L. 13. tit. 16. P. 6.* [L. 13. tit. 16. P. 6. Gl. 2.]

Guardianship ending at fourteen in males, and twelve in females, curatorship commences at those respective ages of the respective sexes; although the nomination of a curator will take place always when guardianship is put an end to, for any of the causes which we shall specify in Title IV., when we treat of this subject.

<sup>13</sup> That there is no *lawful* curatorship, except it is with regard to madmen, is what is stated by *Gregorio Lopez*. But if in this case it is valid, as is to be supposed, from the Roman Law, he should have said, that the same species of curatorship, for the same reason, exists with regard to prodigals. *Palacios* (1).

## TITLE III.

## OF THE OBLIGATIONS OF GUARDIANS AND CURATORS.

CAP. I. IN order to the due discharge by the guardian or [ 12 ] curator of the duties of the office, it is necessary, not only that the guardianship or curatorship be admitted according to the laws of the kingdom, but that it be also exercised according thereto. 1st, The guardianship is admitted according to these laws, when the guardian, on his admission, places in security the minor and his property.<sup>1</sup> 2d, It is duly exercised when the guardian takes care in the first place of the person of the minor, and consequently of his property and effects.

§ 1. That the undertaking the office of guardian consists in placing in security the person and property of the minor, is evident. 1st, Because our laws direct in the first place that the guardian shall give security on oath, L. 9. tit. 16. P. 6. [L. 9. tit. 16. P. 6.] And if he does not give security<sup>2</sup> his acts are invalid, and it even affords ground for the judge's depriving him of the administration; in this case, however, of a mother or grandmother being lawful guardian, they are only obliged to make the renunciations we have before mentioned,<sup>3</sup>

<sup>1</sup> The literal translation is here given; but perhaps the better translation would be, "gives security for the property of the minor."

<sup>2</sup> It would seem, that the testamentary guardian only was excepted from giving security, by the civil law. This is stated in a manuscript course of the Lectures of *Dr. Halifax*, in my possession, although this exception is not stated in the printed analysis of these lectures. *Browne* would seem to infer this exception in p. 134. 1st vol. 2d edit. of his lectures. He says, the legitimate and dative tutor took an oath nearly resembling that of our executors and administrators, to administer faithfully, and to render a just account when required. They also were obliged to give security, &c. *Wood*, in his *Inst. Civ. L.* p. 129, 130. 4th fol. edit., speaking of the administration of tutelage and curatorship, says:—"That this security is to be constantly given by those guardians which the law only does assign; for it is not required from guardians appointed by testament, or by the magistrate upon inquisition; for the testator and the magistrate, by such a designation, have already approved of their honesty. But these two may sometimes be forced to give security," &c. Since the foregoing note was written, the translator has obtained the edition of the text, with notes by *Palacios*, who observes on this point, "that when L. 9. tit. 18. P. 6., & L. 94. tit. 18. P. 3., which also treats of this matter, say that guardians ought to give security, they only speak of lawful guardians; but that they make no mention of testamentary guardians, nor of those judicially appointed (*dativos*), nor is there any law which imposes on them such an obligation." He adds, however, that practice has nevertheless established the giving security also by guardians judicially appointed; and that *Greg. Lop.* Gl. 5. L. 9. tit. 16. P. 6. stated it was the case in his time.

<sup>3</sup> *Palacios* (2) here observes, that he finds a law which obliges lawful guardians to give security; and that he does not discover any which exempts from this obligation the mother nor grandmother; and that he does not, on this account, feel himself warranted in saying that they are released therefrom; that if authority, besides reason, avails any thing in this case, *Gregorio Lopez*, (and many other authors) in Gl. 8. L. 9. tit. 16. P. 6. say, that they ought to give security.

L. 9. tit. 16. P. 6. [L. 9. tit. 16. P. 6.] 2d, Because guardians and curators are obliged to make an inventory; and if they do not, may be removed, unless there be just cause for their not making it; but even in this case it ought immediately to be ordered to be done,<sup>4</sup> L. 15. tit. 16. P. 6. [L. 15. tit. 16. P. 4.] And this inventory must be made with the permission of the judge, before a public Escribanò, and with a specification of moveables or personal effects, of real property, and other things prescribed by L. 99. tit. 18. P. 3., [L. 99. tit. 18. P. 3.,] this inventory being of such force and effect, that no opposition can be made to its correctness by the guardian, although he may have therein enumerated more property than the minor possessed, L. 120. tit. 18. P. 3. [L. 120. tit. 18. P. 3.] But when there is no property the guardian ought to make a solemn declaration to the effect before the judge, in order that this declaration or protest may serve him by way of inventory, or discharge with regard to accounts, *Lopez on L. 99. tit. 18. P. 3. Gl. 3.* [L. 99. tit. 18. P. 3. Gl. 3.] 3d, Because the property of the guardian is pledged, or bound to the minor and his heirs, from the day on which he began to exercise his guardianship, until that of his rendering an account thereof, L. 23. tit. 13. P. 5. [L. 23. tit. 13. P. 5.]

§ 2. The guardianship being entered on under these solemnities, it ought to be faithfully and lawfully administered. For which reason, as it often happens that this administration is committed to many, either because the testator appoints them, or because they happen to stand in the same degree of consanguinity to the minor, and the magistrate assigns this charge equally to all, which always produces disputes among the co-guardians, and bad consequences to the minor; they may agree upon one among themselves to discharge the duties of the administration with the approbation of the judge; who, in case they should disagree as to the nomination, may name, as administrator, him who shall offer the best security, L. 11. tit. 16. P. 6. [L. 11. tit. 16. P. 6.]

In order to this good or faithful administration two obligations are necessary; one which regards the care of the person of the minor, and the other which relates to the care of his property. The first is the principal, and it follows, in the first place, 1st, That the guardian can in no case leave the minor defenceless: wherefore, 2d, He ought to prosecute or defend the suit commenced by, or instituted against him; in which case if there be two or more guardians, either of them may do it alone, if the others be not present: but this must be understood when the minor is under seven years of age; because if he be older, he may himself prosecute and defend with the consent and presence of his guardian, L. 17. tit. 16. P. 6. [L. 17. tit. 16. P. 6.]

<sup>4</sup> The guardianship or curatorship being appointed, that is to say, being committed by the judge to the guardian or curator respectively, the practice is "to deliver the property to him by inventory, before he enters on the exercise of his office, for the responsibility of which he binds himself in the instrument which he executes, in order to avoid all fraud and suspicion of occultation." *Palacios* (3).

3d, The guardian ought to appear in person in these suits, and not by attorney, L. 17. tit. 16. P. 6.; [L. 17. tit. 16. P. 6.;] and 4th, if he find himself prevented from doing so, he may name an attorney for a particular suit, which must be expressed in the power, the form [ 14 ] of which will be seen in L. 96. tit. 18. P. 3., [L. 96. tit. 18. P. 3.,] but always under the obligation of being subject to, or liable for the injury or damage which may result from this appointment, L. 96. tit. 18. P. 3. [L. 96. tit. 18. P. 3.] 5th, If sentence or final judgment be given against the guardian, in such suits, levy must not be made upon his property, but upon that of the minor, L. 17. tit. 16. P. 6. [L. 17. tit. 16. P. 6.] 6th, He ought to interpose his authority in the affairs and contracts of the minor; because otherwise the minor shall not be bound to the performance of the contract, or to those with whom he makes it, unless the obligation or covenant be beneficial to the minor, as laid down in L. 17. tit. 16. P. 6. [L. 17. tit. 16. P. 6.] 7th, He ought to provide for him education and instruction in those sciences or arts suited to his family, birth, and property, L. 16. tit. 16. P. 6. [L. 16. tit. 16. P. 6.] 8th, He ought to provide him with aliment from his personal property (*caudales*) according to the direction of the judge, leaving always the real property (*finca*<sup>5</sup>) untouched; but when it is not fit to make known the state of his riches or poverty, the guardian may furnish it from his own means, and afterwards have recourse for remuneration to the property of the minor, L. 20. tit. 16. P. 6. [L. 20. tit. 16. P. 6.] 9th, He must provide him with a house or dwelling, which shall be the one that his father shall have pointed out in his will; and in case of no such direction, he shall be brought up in the house of his mother;<sup>6</sup> but should the minor have no mother, or should she marry a second time, he must be brought up in the house which the judge shall determine upon, who must take care of the minor, and attend to his welfare; but by no means shall he be brought up in the house of the person who may inherit the property of the minor, L. 19. tit. 16. P. 6. [L. 19. tit. 16. P. 6.]

The second obligation, which relates to the care of the property of the minor, is comprehended under the following rules: 1st, That the guardian cannot alienate or dispose of any of the moveable goods or chattles (*muebles*)<sup>7</sup> of the ward without the permission of the judge

<sup>5</sup> I have translated "*caudales*" personal property, and "*finca*" real property; but I apprehend the meaning of the text, as gathered from L. 20. tit. 16. P. 6. is, that the interest of money, before the capital and personal property, such as money, and the rents or produce of real estate, shall be applied for the purposes mentioned, before recourse is had to the real property of the minor.

<sup>6</sup> Being of good fame. Vide L. 19. tit. 16. P. 6.

<sup>7</sup> i. e. Personal property. The text makes use of "*muebles*," but the law quoted uses the word "*cosas*," which implies property in general, without distinction; whereas "*muebles*," in its fullest sense, only comprehends all sorts of personal property. *Greg. Lep. Gl. 2. L. 4. tit. 5. P. 5.* seems to think, that personal property is not understood by this law; and he appears to be supported in this opinion, from what may be inferred from L. 14. tit. 11. P. 4. ad fin. "*mas si quisiesse dar la dote de las cosas muebles*," &c. Vide also L. 18. tit. 16. P. 6. Since this was written, the possession of the edition of the text by *Palacios*, enables me to add, that the guardian may dispose of the personality (*cosas*

of his domicile, which shall not be granted without cognisance of the cause of such alienation or sale, and of its utility to the minor, L. 4. tit. 5. P. 5. [L. 4. tit. 5. P. 5.]; however he may make such sale without the knowledge of the judge, when it is done for the purpose of providing a marriage portion (*dote*) for a female ward,<sup>8</sup> L. 14. tit. 11. P. 4. [L. 14. tit. 11. P. 4.] 2d, Much less can he dispose of the real property of the minor, unless it be to enable him to pay debts due by the father, or to marry the brother of the minor;<sup>9</sup> but then he must obtain the approbation of the judge for the purpose, L. 18. tit. 6. P. 6. and L. 14. tit. 11. P. 4. [L. 18. tit. 6. P. 6. and L. 14. tit. 11. P. 4.] 3d, And even in these cases, which furnish just causes for the alienation of the real property, the judge shall not consent to the sale of the house [ 15 ] of the father or grandfather of the minor<sup>10</sup> in which it appears he was born, unless it cannot be possibly avoided, L. 18. tit. 16. P. 6. [L. 18. tit. 16. P. 6.] 4th, Neither can the guardian mortgage or pledge the real property without the authority of the judge, but he may the personal<sup>11</sup> provided manifest advantage result therefrom to the minor; for which purpose he may<sup>12</sup> lay out the money so taken or borrowed on mortgage or pledge for the minor's profit and gain, L. 8. tit. 13. P. 5. [L. 8. tit. 13. P. 5.] 5th, That the guardian cannot purchase any thing belonging to the minor without the express permission of the judge<sup>13</sup> and the consent of his co-guardians, L. 23. tit. 11. lib. 5. Rec. L. 4. tit. 5. P. 5. [L. 1. tit. 12. lib. 10. Nov. Rec.]; and even in this case it must be for the manifest advantage and utility of the minor, for if it be not, the minor has his remedy of restitution against the injury, the demand for which he must make judicially within four years after coming of age, L. 4. tit. 5. P. 5. [L. 4. tit. 5. P. 5.] 6th, But notwithstanding the guardian may, of his own authority, incur all necessary expenses; which the law allows, such as for the payment of schoolmasters, debts, marriage portions (*dotes*), &c., for the repayment of which all the property of the minor remains

*muebles*) not of a precious kind, without the authority of the judge, according to the more commonly received opinion.

<sup>8</sup> *Palacios* (2) observes, that what L. 14. tit. 11. P. 4. cited, says, is, that a femme coverte under 25 years of age, may assign to her husband, with the authority of her curator (*dote*), out of her personal property; but that she cannot out of her real property, without the authority of the judge. He adds, that without the knowledge and consent of the judge, and without cognisance of the cause, the guardian cannot alienate the property of his ward, neither for the purpose of giving a marriage portion, (*de dote*) to his female ward, or her sister, nor for any other purpose; and he refers to L. 18. tit. 16. P. 6. and others.

<sup>9</sup> The sister of the minor, or the minor himself, and for other necessary, just, or lawful reason. *Vide* L. 18. tit. 16. P. 6., quoted in the text.

<sup>10</sup> Nor the old servants of ditto. *Vide* the law quoted, L. 18. tit. 16. P. 6. *ad fin.*

<sup>11</sup> It is the opinion of *Palacios* (4) that L. 8. tit. 13. P. 5. must be understood only to mean such personal property as is not precious or valuable.

<sup>12</sup> *Palacios* observes, that it would be more correct to say, "ought to lay out or invest," inasmuch as L. 8. tit. 13. P. 5., cited in the text, directs it to be done.

<sup>13</sup> L. 1. tit. 12. lib. 10. Nov. Rec. (L. 23. tit. 11. lib. 5. Rec.) makes no such exception; and see *Azevedo* on this law. N. 5. and 6.

bound to the guardian. *Greg. Lop.* on L. 23. tit. 13. P. 5. Glo. 4. *ad fin.*<sup>14</sup> [L. 23. tit. 13. P. 5. Ll. 4.]

§ 3. The administration of guardianship being weighty or burthen-some, it would be difficult to find guardians who would discharge this obligation gratuitously; upon which principle is founded the provision made by L. 2. tit. 7. lib. 3. *del Fuero Real*, which assigns to the guardian for his trouble the tenth (*decima*) of the rents or produce of the property of the minor, after deducting the expenses,<sup>15</sup> from the day the guardian accepted the office, took the necessary oath, and gave the requisite security. The origin of this allowance of the *decima* is to be found in the laws of the Goths, as appears by L. 3. tit. 3. lib. 4. *Fuero Juzgo*. This subject is fully treated of by *Gaspar Balsa*, in his work *de Decima Tutori Hispano jure præstanda*, to which we refer.

§ 4. These principles apply to the curators or administrators of minors under twenty-five years of age; and in order to determine whether the contracts which they celebrate or enter into without the authority of their curator be valid or not, it must be ascertained or seen whether they be useful or prejudicial to them; which rule is laid down in L. 17. tit. 16. P. 6., [L. 17. tit. 16. P. 6.], and which is confirmed with respect to different kinds of obligations or contracts by Ll. 3, 4, and 5. tit. 1. P. 5.; [Ll. 3, 4, 5. tit. 1. P. 5.]; L. 4. tit. 12. P. 5.; [L. 4. tit. 12. P. 5.]; L. 47. tit. 13. P. 5., [L. 47. tit. 13. P. 5.], and by other laws. Not only is the contract which is prejudicial to the minor null, but he may also recover damages for loss (*menos-* [16] *cabos*) sustained thereby according to Ll. 2, 3. 5. and 7. tit. 19. P. 6., [Ll. 2, 3. 5. 7. tit. 19. P. 6.], unless there be fraud or deceit (*engaño*) on the part of the minor; for the law protects or favors the person cheated or deceived, L. 6. tit. 19. P. 6.<sup>16</sup> [L. 6. tit. 19. P. 6.]

<sup>14</sup> This is not the opinion of *Greg. Lop.* himself; but he refers to another author, *Alberic*; whose opinion seems to be, that the guardian has not a tacit lien on, or right of retention of, the property of the minor in such cases, except the demand be clear, or settled (*debitum liquidum*).

<sup>15</sup> See L. 4. tit. 14. P. 6. *Ayora, de Partit.* p. 125, n. 9., says: "*Deductis expensis quærendorum colligendorum conservatorumque gratiâ factis.*"

*Palacios* (1), here, observes, that the *decima* does not belong to the guardian, nor curator of the king, or of noblemen (*magnates*), and powerful or opulent persons (*poderosas*), who have large rents or incomes; nor to the curator of the property of absent, captive, or deceased persons, because he is compared to an attorney who is not entitled to the *decima*; and therefore to all such a moderate salary, proportioned to their labor, is allowed. He refers to (*Fobr. Reformado*) P. 2. lib. 1. cap. 1. § 2. num. 88.

<sup>16</sup> In Trinidad the rights and properties of minors are further protected, in the appointment of a public officer, under the denomination of Father General of Minors, and in the registration of the accounts of all guardianships and curatorships, and of the securities entered into for the faithful discharge, by guardians and curators, of their duties. See Appendix A.



## TITLE IV.

OF THE EXCUSES OR EXEMPTIONS (EXCUSAS) OF GUARDIANS AND CURATORS, AND OF THE COMPLETION OF GUARDIANSHIP AND CURATORSHIP.

CAP. 1. As a guardian or curator appointed by either of the be-forementioned ways may renounce or refuse this appointment, alleging in due time before the judge the excuse or cause, it is considered or determined that his office is personal and public, because the same things which generally excuse or exempt from a public personal office, also exempt from guardianship. Excuse or exemption is to show judicially some lawful reason for which one who is appointed guardian of any minor is not obliged to undertake the guardianship of his person or property, L. 1. tit. 17. P. 6. [L. 1. tit. 17. P. 6.]

§ 1. The excuses are either voluntary or necessary. Voluntary excuses are judicially admitted by reason of privilege, of inability, (*impotencia*) or of delicacy, (*honestidad*.) By reason of privilege [ 17 ] are excused, 1st, Those who have five lawful and natural sons born alive, although they may have lost some of them in war in the service of the king, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 2d, Collectors of the royal rents, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 3d, Ambassadors, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 4th, Judges actually employed, (*en actual residencia*), L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] Which four excuses are only admitted if proved before entering on the guardianship, but do not avail after, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 5th, Professors of grammar, rhetoric, logic, and medicine, if they are in the actual exercise of their callings in their country, or if out of it by royal command or permission, L. 3. tit. 17. P. 6. [L. 3. tit. 17. P. 6.] 6th, Doctors of law who are judges or counsellors; professors of philosophy and knights who are about the court of the king, L. 3. tit. 17. P. 6. [L. 3. tit. 17. P. 6.] 7th, He that is absent or abroad by order of the king, being appointed guardian provisionally by the judge; but after he returns to his country, the charge of guardianship again devolves to him, and he cannot be appointed to another guardianship within a year, unless by his own consent, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.]

Those who are exempted from the office of guardians by reason of inability or incapacity, are, 1st, He who is already burthened with three guardianships, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 2d, The poor person (*pordiosero*) who only subsists upon what he obtains or earns daily, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 3d, He who is continually sick and unable to attend to his own affairs, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 4th, He who can neither read nor write,

and dare not, for such reason, attempt to perform the duty, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 5th, The person above seventy years of age, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] But these exemptions do not belong to the person paying tax (*pechero*) to the king, as observed by L. 12. tit. 14.; [L. 12. tit. 14.]; L. 6. Rec.<sup>1</sup> [Lib. Rec.]

Lastly, those entitled to voluntary excuses by reason of delicacy, or courtesy, (*honestidad*), are, 1st, He who has entertained capital enmity towards the father of the minor, or was his actual enemy, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 2d, He who has or expects to have a law suit with the minor, L. 2. tit. 17. P. 6. [L. 2. tit. 17. P. 6.] 3d, The husband appointed guardian of the property of his minor wife, because, to avoid all suspicion with respect to himself, he ought to pray for the appointment, by the judge, of another guardian,<sup>2</sup> L. 3. tit. 17. P. 6. [L. 3. tit. 17. P. 6.]

Necessary excuses are those for which a person appointed guardian cannot, although he might wish it, take upon himself the [ 18 ] charge of the administration, and are referred to in Title II.

§ 2. The guardians, who wish to be excused from the burthen, ought to set forth their claim before a competent judge, for which purpose it is necessary, 1st, That a petition be presented within fifty days after the party knew of his appointment. 2d, That this process be instituted in the tribunal of the judge of the place in which the guardian resides who claims to be excused. 3d, That if he should be absent at a distance of more than 100 miles, he shall be allowed a day for every twenty miles of such excess, in addition to the thirty days which he is entitled to by reason of the 100 miles, in order to come to allege his excuse. 4th, That within four months<sup>3</sup> the suit to determine the validity of the allegation of excuse shall be concluded. 5th, That if the party claiming to be excused shall feel himself aggrieved by the sentence of the judge, he may appeal to the superior court, L. 4. tit. 17. P. 6. [L. 4. tit. 17. P. 6.]

Cap. 2. Guardianship and curatorship end in many ways. 1st, By the age of the ward, which is fourteen in males, and twelve in females,<sup>4</sup> as is inferred from the definition of guardianship and curatorship, L. 21. tit. 16. P. 6.; [L. 21. tit. 16. P. 6.]; and thus curatorship is terminated at twenty-five years. 2d, By the death or banishment of the guardian or ward, L. 21. tit. 16. P. 6. [L. 21. tit. 16. P. 6.] 3d, By the fulfilment or completion of the condition and time, which is peculiar to testamentary guardianship; because, as we have before

<sup>1</sup> Omitted in *Novissima Rec.*—See Nota, p. 26. *Table of Laws in Novissima Rec.* edit. 1805; also L. 21. tit. 14.; lib. 6. *Rec.*; or L. 12. tit. 18. lib. 6. *Nov. Rec.*

<sup>2</sup> But it should be remembered, that by the last law (14) of tit. 1. lib. 5. *Rec.* [L. 7. tit. 2. lib. 10. *Nov. Rec.*] a married man, who has attained 18 years of age, may administer his own property, and that of his wife, without the necessity of praying for, nor of obtaining royal license (*venia*) for the purpose. *Palacios* (1).

<sup>3</sup> To be counted from the day on which the fifty days began to run. L. 4. tit. 17. P. 6. *Palacios* (3).

<sup>4</sup> That is, with respect to the first, when guardianship or tutelage ends, then curatorship begins.

said, the testator alone can impose a condition on the guardian, or fix the duration of his appointment. 4th, By adoption.<sup>5</sup> 5th, By removal.

§ 1. The last mode by which we have said that guardianship is ended, is the removal of the suspected guardian, which takes its rise from that certain or established principle by which the guardian is obliged to administer, with the utmost fidelity and care, the property of the minor, wherefore those are called or considered suspected who practise or are guilty of fraud, undue conduct, or injury in the discharge of the office of guardian; or who by their habits or conduct cause themselves to be suspected, although otherwise they have where-withal to pay, Princip. tit. 18. Part. 6.; whence are deduced these three axioms. 1st, That whoever manifests bad management or improper conduct is suspected. 2d, That he is deserving of removal [ 19 ] and punishment who shall produce any remarkable injury to the ward. 3d, That the accusation or charge in this case is public<sup>6</sup> by reason of its object, end, and form.

From the first axiom it results, 1st, That poverty alone does not cause a guardian to be suspected, if he be in other respects of good character; and therefore although poverty may produce his removal from the administration, because the property of the minor is in danger, the guardian shall not be accounted as suspected; but if he should have lavished or misspent the property of another ward, or have been guilty of improper conduct, this will give room for suspicion, L. 1. tit. 18. P. 6. 2d, That if once the guardian be accused or suspected, he shall not be absolved from the accusation on giving security. Wherefore, 3d, although he be rich, and promise or bind himself to make good the damage sustained, he ought not to be allowed to continue in the administration of the guardianship, L. 1. tit. 18. P. 6. [L. 1. tit. 18. P. 6.]

From the second axiom it is inferred, 1st, That if the guardian be accused, he ought to be deprived of the administration pending the suit or trial, and a provisional curator appointed, L. 3. tit. 18. P. 6. [L. 3. tit. 18. P. 6.] 2d, That if it appear upon this trial that he has caused very great injury (*daño notable*)<sup>7</sup> to the ward, he shall be rendered infamous, and shall pay the damages, L. 4. tit. 18. P. 6. [L. 4. tit. 18. P. 6.]; provided, however, he shall not be considered infamous if he be only accused as an indolent and negligent or inattentive man, L. 4. tit. 18. P. 6. [L. 4. tit. 18. P. 6.]

From the third axiom it is inferred, 1st, That the mother, grandmother, sister or nurse of the minor are obliged to bring forward this accusation by reason of that greater interest they take in his welfare, L. 2. tit. 18. P. 6. [L. 2. tit. 18. P. 6.] 2d, That any of the neigh-

<sup>5</sup> Of the ward, not of the guardian. *Palacios* (1).

<sup>6</sup> This implies no more, according to *Palacios* (1), than that the right of accusation, or action, belongs to all the people, i. e. is popular.

<sup>7</sup> That is to say, if he has been guilty of wilful fraud. See L. 4. tit. 18. P. 6. quoted in the text.

bors or inhabitants of the place, although they be women, may prefer the accusation, except wards under fourteen, L. 2. tit. 18. P. 6. [L. 2. tit. 18. P. 6.] 3d, But minors above fourteen may accuse their curators with the consent or advice of their relations, L. 2. tit. 18. P. 6. [L. 2. tit. 18. P. 6.] 4th, That this accusation may be preferred against any description of guardian, L. 2. tit. 18. P. 6. [L. 2. tit. 18. P. 6.] 5th, That it ought to be instituted before the judge of the place where the property of the ward is situate, L. 2. tit. 18. P. 6. [L. 2. tit. 18. P. 6.] 6th, That there being no person who will undertake the accusation, and the indications of his bad conduct being manifest, the judge may, of his own authority, remove him, citing him before him, and appointing a curator ad interim, L. 3. tit. 18. P. 6. [L. 3. tit. 18. P. 6.]

Cap. 3. The guardianship being ended for or by any of the before-mentioned reasons or ways, the guardian ought to render an account to the curator of the pupillary guardianship, if it shall be completed, by the ward having attained the age which frees him from subjection to the guardian. But if the latter shall have been re- [ 20 ] moved as suspected before the completion of the pupillary age, he must then render an account to the guardian appointed by the judge. And the curator upon the termination of the curatorship, by reason of the young person having completed the age of twenty-five, shall give an account to the ward personally, L. 21. tit. 16. P. 6. [L. 21. tit. 16. P. 6.] For which reason or purpose not only the property of the guardian and curator, but also of their sureties and heirs, is bound to the minor and his heirs, L. 21. tit. 16. P. 6. *ad fin.* [L. 21. tit. 16. P. 6. *ad fin.*] The charge or burthen to which guardian and curator are subject in this proceeding may be well inferred from the obligations they are under, and which are referred to in the third title.

Finally, the doctrine contained in this chapter, may be applied to a curator, bearing in mind the points of difference between his office and that of guardian.

We do not treat upon the guardianship of the sons of our kings, because this belongs more to the public law of Spain. Upon this subject, L. 3. tit. 15. P. 2.<sup>a</sup>, [L. 3. tit. 15. P. 2.] and *Gutierrez de Tutel & Curis*, P. 1. c. 18. may be consulted.

<sup>a</sup> The constitution of the Spanish monarchy of 19th March, 1812, now re-established in Spain, makes some little alteration in the law quoted in the text. L. 3. tit. 15. P. 2. directs, that the persons whom the deceased king may have appointed in his will, &c. shall be guardians to the king minor; that in default, the *grandees (mayorales)* of the kingdom, also the prelates, and the *ricos homes*, and other good and honorable men of the towns shall assemble, and after having taken prescribed oaths, shall choose one, three, or five, but not more, fit persons to be guardians of the minor monarch; but in case the queen-mother should be alive, and being a widow, she shall be the principal, or chief guardian. The minority of a king continued by this law to twenty; and that of a queen, or female, until her marriage or puberty. The requisites for the appointment of guardian to the minor monarch were eight: those which deserve mention were, being natural born subjects, and not entitled to the succession after the death of the king. The 198th article of the constitution directs "The person whom the deceased king may have ap-

pointed in his will, shall be guardian to the king minor. If he should not have appointed one, the queen-mother shall be guardian while she remains a widow. In default of the queen-mother, the guardian shall be nominated by the Cortes. In the first and third case, the guardian must be a native of the kingdom." And the minority of the king is limited by it to eighteen; and it provides, that during his minority or other incapacity, the kingdom shall be governed by a regency; and that if his immediate successor have attained 18 years, if the incapacity of the king should exceed two years, the Cortes may nominate him regent. *Vide* on this subject chap. 3. commencing Art. 185 of the Constitution.—N. B. Since the above note was written, a sad change has taken place in the affairs of Spain. The Cortes no longer exists.

## TITLE V.

## OF PERSONS IN THEIR CIVIL STATE OR CAPACITY.

CAP. I. HAVING explained the natural state of persons, its divisions and properties, or qualities, we will proceed to do the same with respect to their civil state or capacity, which is the second branch of the first division we made at the commencement of this [21] work.

With regard to their civil state or capacity, men are considered, 1st, as natural-born subjects of these kingdoms, and as aliens or foreigners. 2d, As nobles, persons entitled to the rights of nobility, (*hidalgos*), knights, (*caballeros*), and plebeians. 3d, As laymen and ecclesiastics. The distinction into freemen and slaves, which is found in our law in P. 4. tit. 21 and 22, is not now observed or acknowledged, unless it be with respect to the negroes employed in the Indies in working the mines, or held in slavery by private individuals; but even as regards this circumstance, it is foreign to this treatise.<sup>1</sup>

<sup>1</sup> To the resident of a West Indian colony, where the system of slavery exists, and the laws referred to in the text form part of its legal establishment, it must be matter of regret that the learned authors have acted on this opinion, and abstained from giving the substance of those laws, and of others to be found on this important subject, in the Spanish codes. It is an object of concern to the Translator, that want of time will not allow him, at present, to supply this omission to its fully desired extent. He has, however, considered it necessary to furnish the reader, in the Appendix, with those regulations and enactments which the British government, since the conquest of Trinidad, have thought fit to engraft in the old legislative provisions of Spain.

Among the latter may be noticed the *Royal Cedula* of the King of Spain, of the 31st May 1789, containing instructions or regulations to be observed by the owners and possessors of slaves, in respect to their education, food, clothing, employment, diversion, habitation, care, medical treatment, and marriage; as also those to be attended to by the slaves in regard to their duties towards their owners; and others in respect to the correctional punishment of the slaves for domestic offences, extending to that by magisterial authority for criminal excesses; also in regard to the annual written return, with specification of sexes, births, deaths, &c. of the slaves, on oath, by the owners or possessors, before the judge or magistrate of the town or district, with the view to registry, by the escribano or clerk of the *ayuntamiento*, or town council or corporation, in a record book to be kept for the purpose; and in reference to the violation of these regulations by the owners, and to the trial and punishment of them and of other persons for excess, ill-treatment, or cruelty towards the slaves. Although this *cedula* was officially acted upon in *Trinidad*, in respect to the feeding, clothing, treatment, protection under the especial appointment of the Syndic Procurator General, held, until recently, by His Majesty's Attorney General of Trinidad; and the correctional punishment of the slaves, and in respect to their annual return or registry on oath, as above-mentioned, it does not appear to have been legally in force in the island, unless in so far as it was afterwards confirmed by an order in council of his late Majesty of the 26th March 1812, and referred to by a proclamation of the present Governor of Trinidad, Sir Ralph Woodford, bart. containing orders and regulations respecting the public good of the island.

This supposition is supported by a note in a Spanish law work of great utility and repute, entitled "*Tratado de la Legislacion Universal de España e Indias*," which contains the *cedula* in question. In this note it is stated, that by a royal order, posterior to the

Cap. 2. The state of a natural born subject (*la naturaleza*) signifies or imports the duty imposed upon men with respect to one another by some right or lawful reason of loving and cherishing each other, L. 1. tit. 24. P. 4. [L. 1. tit. 24. P. 4.] According to this definition, which comprehends, generally, the obligation which natural-born subjects are under towards those to whom they are bound by some lawful cause or motive, the ten modes of acquiring the rights of a natural-born subject, expressed in L. 2. tit. 24. P. 4., [L. 2. tit. 24. P. 4.] take place; but all of them not being within the scope of our

*cedula*, the fulfilment or enforcement of the latter was directed to be suspended until the further-to-be-expressed pleasure or direction of the king of Spain. No such subsequent expression of the royal will appears to have emanated from his Spanish majesty. In further corroboration of the opinion hereinbefore hazarded, it may be added, that this *royal cedula* is not incorporated in the edition of the laws of Spain, entitled *Novísima Recopilacion de las Leyes de España*, and that by a notice to the title of laws in this compilation, it is declared, that the laws and ordinances in the previous edition, entitled "*Nueva Recopilacion de las Leyes de España*," not inserted in the *Novísima*, are purposely omitted by reason of being obsolete, repealed, or useless.

The first British enactment on the subject, in point of time, is an ordinance of the late General Sir Thomas Picton, then governor of Trinidad, dated June 30, 1800, about two years and a half after its conquest by the British arms. This ordinance evinces, in its provisions, much practical humanity and solid advantage in regard to the slaves.

Subsequently to this ordinance, appeared the order in council of the 26th of March, 1812, establishing a public registry for the registration and enrolment of the names and descriptions of all persons then being, and thereafter to be held in a state of slavery within the island of Trinidad, and of the deaths and births of all such slaves. The period of registry directed to be annual by this order in council, was made triennial by a subsequent one of the 18th September, 1816. Further effect was given to the order in council of the 26th of March, 1812, by an act of the British Parliament, 59 G. 3. c. 120.

More recent regulations and changes with respect to slaves have been made by the order in council of the 16th September, 1822, providing for the administration of criminal justice, by which the discretionary admission by the court of their testimony in criminal cases was first legalised; by an order in council of the 10th March, 1824, and by a proclamation of the colonial government founded on the latter. Some modifications, or explanations, in regard to the order in council of the 10th March, 1824, have been made or given, in a circular issued on the subject by Sir R. Woodford, governor, in conformity with instructions from Earl Bathurst, His Majesty's Secretary of State for the Colonies. This circular, which has been taken from the Times newspaper of the 18th November, 1824, will be found in the Appendix, with the several British orders in council, and enactments hereinbefore adverted to, vide Appendix, B. C. D. E. F. G. H. I.

To those who take an interest in questions connected with this subject, it may prove a source of satisfaction to be informed, that by the laws in force and practice in Trinidad, and which existed previously to the promulgation of any of the British enactments, before noticed, *omnes liberi præsumuntur nisi constet de servitute*, that although the owners of slaves, and the managers, or *mayordomos*, appointed by the owners, to whom the power was by those laws restricted, could inflict on the slaves correctional punishment to the limited extent permitted, for domestic offences, if they exceeded in this, by causing grievous contusion, effusion of blood, or mutilation of member, in addition to the pecuniary penalties provided, they, as also all other persons who ill-treated or injured a slave, were subject to a criminal prosecution before the ordinary tribunals of the colony, at the instance of the Syndic Procurator General, the official protector of slaves, and liable to the punishment, corresponding to the injury or offence, as though the slave were a free person: besides which, that in the case of the owner being the offender, the slave was directed to be confiscated and sold to another owner, if able to work, and his value or proceeds applied to a public purpose: and if the slave was incapable, or unfit to be sold, the owner, without having the slave returned to him, or to his manager, guilty of the excess or injury, was bound to furnish or advance for the daily sustenance and clothing of the slave, during life, a sufficient sum to be fixed by the judge.

present consideration, on account of some of them appertaining to the laws of nations, and by reason of others being subject to the jurisdiction of the magistrate, we will preserve an entire silence as to the first; and with respect to the last, will treat of them in their respective places, contenting ourselves, at present, with describing as a natural-born subject of these kingdoms "the person who is a native of them, or born of parents both of whom were, or at least the father was, born therein, or had obtained a domicile in them, and had besides lived at least ten years therein," according to the suppletory law, L. 19. tit. 3. lib. 1. *Rec.* [L. 7. tit. 14. lib. 1. Nov. Rec.]

§ 1. Hence it follows, 1st, That there are two modes of acquiring the rights of a natural-born subject, either by having been born in these kingdoms, or by being the child of a father, a native thereof; or of parents who have resided therein ten years, with the intention of domiciliating there, L. 19. tit. 3. lib. 1. *Rec.* [L. 7. tit. 14. lib. 1. Nov. Rec.] 2d, That if the father shall have been absent, or abroad in the service, or by order of the king, and during such absence shall have had a child born out of the kingdoms, it shall, notwithstanding, be a natural-born subject, as being considered as though born in Spain, L. 19. tit. 3. lib. 1. *Rec.* [L. 7. tit. 14. lib. 1. Nov. Rec.] 3d, That this is understood as with respect to natural and lawful children; for with respect to spurious children, (*espurios*),<sup>3</sup> it is [ 22 ] necessary that both their father and mother shall have been born, or have domiciled in the kingdom for ten years, in order to their acquiring the rights of natural-born subjects, L. 19. tit. 3. lib. 1. *Rec.* [L. 7. tit. 14. lib. 1. Nov. Rec.]

By reason of this state, (*naturalidad*,) there arise between the king and his natural-born subjects certain obligations which belong to public law. See P. 2. from tit. 2. to tit. 21.

§ 2. The rights of a natural-born subject having been acquired, 1st, The person so acquiring them is capable of holding public employments and posts. 2d, He is obliged to do or grant to the king all that is enjoined by P. 2. from tit. 12. to tit. 31.<sup>4</sup> 3d, He cannot be sued out of the kingdom, Aut. 3. tit. 8. lib. 1. *Rec.* [Nota 3. tit. 29. lib. 4. Nov. Rec.] He is prohibited, under pain of loss of property and perpetual banishment, from going out of the kingdom for the purpose of study, excepting in the universities of Bologna, Coimbra, Rome, and Naples, L. 25. tit. 7. lib. 1. *Rec.* [L. 1. tit. 4. lib. 8. Nov. Rec.] But the reasons for this enactment having ceased, we apprehend it is not now observed. 5th, Natural-born subjects cannot wear other clothes than those manufactured in the kingdom, Aut. 7. tit. 2. lib. 5. *Rec.*<sup>5</sup> A most excellent law, but totally unobserved.

<sup>2</sup> Vide L. 1. tit. 11. lib. 6. Nov. Rec.

<sup>3</sup> Begotten on a woman who has promiscuous intercourse with many men. Vide L. 1. tit. 15. P. 4.

<sup>4</sup> These duties are too numerous for the subject of a note; and I must refer the reader, who is desirous of more particular information, to the reference in the text.

<sup>5</sup> Omitted in *Novissimis Rec.*



§ 3. The rights of a natural-born subject may be lost or renounced, 1st. by five<sup>6</sup> modes or ways. 1st, By treason against the king; and this includes the forfeiture of property and honors, or titles. (*mercedes*,) L. 5. tit. 24. P. 4. [L. 5. tit. 24. P. 4.] 2d, If the king machinates the death of a natural-born subject without justice or law. 3d, If he denies him justice. 4th, If he dishonors his wife, L. 5. tit. 24. P. 4. [L. 5. tit. 24. P. 4.] These three last may have given rise to the 5th, which consists in the denaturalisation, (*desnaturalizacion*,) or voluntary renunciation of his rights and allegiance by the natural-born subject.<sup>7</sup> By which all reciprocal obligations between the sovereign or lord and the subject cease; because denaturalisation signifies or implies, as it were, the relinquishment of or separation from that natural tie or obligation which links the subject with, or binds him to his sovereign or lord, or the land in which he lived, L. 5. tit. 24. P. 4. [L. 5. tit. 24. P. 4.]

§ 4. Powerful or weighty reasons were not wanting for the exclusion, by our legislators, of aliens or foreigners from public and ecclesiastical employments, and the obliging them to the performance of, or compliance with, certain things which were necessary to their good government. Therefore it hath been determined, 1st, That they cannot obtain the appointment of alcade or magistrate, the government of cities or towns, nor be sworn regidores. Ll. 2. and 27. tit. 3. lib. 7. *Rec.* [L. 2. tit. 5. lib. 7. Nov. *Rec.*] 2d, That they cannot obtain ecclesiastical benefices nor pensions relating or annexed to them, Ll. 14. 15. 17. 18. and 25. tit. 3. lib. 1. *Rec.* [Ll. 1. and 2. tit. 14. note 2. tit. 14. and L. 1. tit. 13. lib. 1. Nov. *Rec.*] 3d, That no gifts nor transfers of towns, castles, or jurisdictions, or manors, may be made in their favors, Ll. 1 and 2. tit. 10. lib. 5. *Rec.* [Ll. 6. and 7. tit. 5. lib. 3. Nov. *Rec.*] 4th, That they shall not be put in pos- [23] session of any commendary, (*encomienda*,) Auto. 6. tit. 3. lib. 1. *Rec.*<sup>8</sup> 5th, And in order that these laws should be inviolable, it is prohibited to grant the rights of naturalisation to foreigners, and the nation (*el reyno*) is commanded not to consent thereto, L. 36. tit. 3. lib. 1. *Rec.* [L. 4. tit. 14. lib. 1. Nov. *Rec.*] 6th, That they cannot be exchange nor mercantile brokers, L. 7. tit. 16. lib. 5. *Rec.* 7th, That ignorance of the royal cédulas, proclamations, and edicts, &c. with respect to the exportation and importation of articles forbidden or prohibited, custom-house fees or duties, &c. will not excuse or avail them, *Bobadilla Polit.* L. 4. C. 5. N. 71. See L. 15. tit. 1. P. 1. [L. 15. tit. 1. P. 1.] 8th, That they shall only use the clothes which they bring, contrary to the ordinance respecting clothes, for the space of six months after they enter Spain, L. 1. Cap. 17. tit. 12.

<sup>6</sup> The law referred to, L. 5. tit. 24. P. 4. in the text, specifies only four, as does the text itself.

<sup>7</sup> This is not consonant with the notions entertained respecting the duties of allegiance in Great Britain. *Vide* 1. *Blac. Com.* p. 369. 15. ed.

<sup>8</sup> I suppose this law is obsolete, as it is not to be found in the *Nov. Rec.*; and by Nota 1. tit. 32. lib. 11. *Nov. Rec.* this law is stated to be obsolete.

lib. 7. *Rec.* [L. 1. tit. 13. lib. 6. § 17. Nov. *Rec.*] 9th, That foreign pedlers shall not walk the streets for the purpose of selling, &c. Aut. 1. tit. 20. lib. 7. *Rec.* [L. 11. tit. 5. lib. 9. Nov. *Rec.*] 10th, That they cannot have shambles, nor bakers' shops, nor fish markets, in the towns, L. 2. tit. 3. lib. 7. *Rec.* [L. 2. tit. 5. lib. 7. Nov. *Rec.*] 11th, But they shall not pay tribute-money (*moneda forera*) if it appear that they have dwelt at least three years out of the kingdom, L. 7. tit. 33. lib. 9. *Rec.*<sup>9</sup>

Under another more confined signification we understand by the foreigners of a province those who are not born in it; and under this meaning the charters or particular laws of Arragon prohibited any foreigner from obtaining employments or places of dignity in the kingdom. But king Philip V. by a decree of 7th July, 1723, which is embodied in Auto 30. tit. 2. lib. 3. *Rec.* [L. 5. tit. 14. lib. 1. Nov. *Rec.*] commanded that all persons born in the other dominions of Castille should be admitted equally to these offices or employments in his kingdom, leaving in force the law of Mallorca, (*Majorca*) which directs that no one except a Mallorquin (*native of Majorca*), can obtain any dignity or place of profit in their church, Aut. 30. tit. 2. lib. 3. *Rec.* [L. 5. tit. 14. lib. 1. Nov. *Rec.*]

Cap. 3. The second division of men, according to their civil state or capacity, is into nobles, knights, gentry, or persons descended from nobility, (*hidalgos*), and plebeians. Our laws clearly distinguish these four classes, as will be seen in the course of this chapter.

§ 1. We may define nobility, a union of good actions, to which our ancestors gave the denomination of gentility, (*gentilidad*); which shows as it were a nobleness of temper or goodness. This is [ 24 ] inferred from L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.] which distinguishes three sorts of nobility or nobleness, that by lineage, by wisdom, and actions. The nobleness of actions joined with that of lineage is accounted the most distinguished or the best, L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.] and the latter without the former loses much of its value or consideration, L. 6. tit. 9. P. 2.<sup>11</sup> There is another sort of nobility by possession, which is acquired by title of twenty years, L. 8. tit. 11. lib. 2. *Rec.* [L. 4. tit. 27. lib. 11. Nov. *Rec.*] which alters L. 1. tit. 7. lib. 5. *Rec.*<sup>12</sup> [L. 1. tit. 17. lib. 10. Nov. *Rec.*] which required forty years. This class of nobles most respected or valued, is that which is noble by birth, actions, or wisdom; and it will be found that the nobles of this class are and ought to be preferred to the great offices of state, L. 2. tit. 9. P. 2. [L. 2. tit. 9. P. 2.]; having been held in such estimation from the beginning of our monarchy, that when the crown was given by election to any of the Goths, nobility was necessary to his election as king, L. 8. *Prol. del Fuero Juzgo*.

<sup>9</sup> Obsolete.

<sup>10</sup> Omitted in *Novissima Recop.*

<sup>11</sup> See in this law the distinction and qualities of a *Rico ome*.

<sup>12</sup> *Palacios observes*, that this law does not treat of nobility, but of some of the various modes of proof in respect to entailed property.

For which reason the nobles enjoy many privileges and exemptions, which may be reduced to three kinds, 1st, Exemption from payment of common tributes, or taxes. 2d, Exemption from torture<sup>13</sup> and imprisonment for civil debt.<sup>14</sup> 3d, The exemption from being obliged to retract any insult which they had offered.

The first who exempted the nobles from the payment of taxes was Count Don Sancho, *Garcia de Nobilit.* Glos. 6. n. 8. This privilege will be found confirmed by Ll. 7. 9. tit. 11. lib. 2. and 10. tit. 2. lib. 6. *Rec.*; [L. 3. tit. 2. lib. 6. and L. 2. tit. 27. lib. 11. Nov. Rec. and L. 1. tit. 2. lib. 6. Nov. Rec.]; although L. 19. tit. 14. lib. 6. *Rec.* [L. 5. tit. 18. lib. 6. Nov. Rec.] directs that they shall contribute to public works. This exemption from the payment of taxes extends to the widow of the noble, because she ought to be honored as her husband was, L. 9. tit. 11. lib. 2.; and L. 25. tit. 11. lib. 5. *Rec.*; [L. 2. tit. 27. lib. 11. Nov. Rec. and L. 8. tit. 5. lib. 9. Nov. Rec.]; and it ceases upon her marrying one who is liable to pay taxes, but reverts upon her on again becoming a widow, L. 9. tit. 11. Lib. 2. *Rec.* [L. 2. tit. 27. lib. 11. Nov. Rec.] The ancient solemnity must be observed to which *Villadiego* refers in L. 8. *Prol. del Fuero Juzgo*, n. 52., as necessary to restore her to the enjoyment of this privilege.

The exemption from imprisonment contained in L. 4. tit. 2. lib. 6. *Rec.*<sup>15</sup> [L. 2. tit. 2. lib. 6. Nov. Rec.] ceases, 1st, If the noble renounces it with a solemn oath,<sup>16</sup> *Villadiego* a L. 8. *Prol. del Fuero Juzgo*, n. 64. 2d, If at the time of contracting the civil debt, he concealed<sup>17</sup> the fact of his nobility from the contracting party, *Gomez* [25] on L. 79. of *Toro*, n. 4. 3d, If the noble is made collector of royal tributes or taxes, Ll. 14. 4. tit. 2. lib. 6. *Rec.* [Ll. 15. and 2. tit. 2. lib. 6. Nov. Rec.] 4th, If the debt proceeds from crime or quasi crime; L. 10. tit. 2. lib. 6. *Rec.*; [L. 10. tit. 2. lib. 6. Nov. Rec.]; in which case a better prison is allotted to the noble than the common one for the people, L. 11. tit. 2. lib. 6. *Rec.* [L. 11. tit. 2. lib. 6. Nov. Rec.] As recanting or giving oneself the lie was always accounted a disgraceful thing, the law was desirous of excepting the nobles from such punishment, L. 2. tit. 10. lib. 8. *Rec.* [L. 7. tit. 27. lib. 7. Nov. Rec.] *Villadiego* on L. 6. tit. 3. lib. 12. *del Fuero Juzgo*, n. 16. Another very particular privilege of the nobles is,

<sup>13</sup> See also Ll. 13. and 14. tit. 2. lib. 6. Nov. Rec.

<sup>14</sup> Except for dues to the crown. Vide Ll. 2. and 15. tit. 2. lib. 6. Nov. Rec. In respect to arrest and imprisonment for civil debt, or in civil cases, as regards persons residing in Trinidad, vide Order in Council, 16th September, 1822. Appendix J.

<sup>15</sup> Read, as pointed out by *Palacios*, L. 14. *ibid.* [L. 15. tit. 2. lib. 6. Nov. Rec.]

<sup>16</sup> *Palacios* observes, that the noble cannot renounce this privilege, since he is forbidden by L. 14. tit. 2. lib. 6. *Rec.* [L. 15. tit. 2. lib. 6. Nov. Rec.] under pain of such renunciation being null; that, consequently, the oath cannot confirm a thing which does not exist, for that, as enacted by L. 28. tit. 11. P. 5. no covenant which is against law shall be binding or enforced; although made under a penalty or oath.

<sup>17</sup> Or rather, if he denied the fact: but it was otherwise if the creditor was aware of the fact of nobility, or the party contracting was himself ignorant of it. Vide the reference in the text.

that the officers of justice cannot break open<sup>18</sup> their house, L. 61. tit. 4. lib. 2. *Rec.* [L. 14. tit. 2. lib. 6. *Nov. Rec.*]

As doctors compose the second class of nobles treated of by L. 2. tit. 21. P. 2., [L. 2. tit. 21. P. 2.] it is not surprising that they should also enjoy an exemption from taxes, Ll. 8. 9. tit. 6. lib. 1. *Rec.*<sup>19</sup> [L. 2. tit. 17. lib. 6. and L. 7. tit. 5. lib. 1. *Nov. Rec.*] But this does not extend to bachelors, L. 2. tit. 14. lib. 6. *Rec.*, [L. 10. tit. 18. Lib. 6. *Nov. Rec.*], nor to the illegitimate or natural children of nobles and descendants of nobility (*hijosdalgo*), L. 20. tit. 11. Lib. 2.; and L. 9. tit. 8. Lib. 5. *Rec.*<sup>20</sup> [L. 6. tit. 5. lib. 10. and L. 1. tit. 5. lib. 10. *Nov. Rec.*]

§ 2. Having explained the meaning or nature of nobility in general, we now are about to point out its particular degrees, treated of by our laws. In the first place, we will distinguish the landed (*de solar*) from the titled (*titulada*) nobility, although the latter includes the former. By land (*solar*) is understood the demesne with a house situate in a strong or fortified place (*tierra*) in the mountain, according to *Garcia de Nobil.* Gloss. 18. n. 35. This class of nobility, possessed of a mansion house and land, has been always held in much estimation.

Titled nobility is distinguished by the titles of duke, marquis, count and viscount. The Goths introduced into Spain the title of duke, appropriated to the greater generals of the army, named by the emperor, and wherefore L. 11. tit. 1. P. 2. [L. 11. tit. 1. P. 2.] observes, that duke is as the chief, or leader of an army, who received this command formerly from the hand of the emperor, *Hernan de Mexia*, in Lib. 1. c. 75. of his peerage, (*Nobiliario*), treats of his privileges, which were numerous, and were annulled by L. 8. tit. 1. lib. 4. *Rec.* [L. 15. tit. 1. lib. 6. *Nov. Rec.*]

The title of marquis for some time maintained precedence over that of count, *Salazar de Mendoza, Origen de las Dignid. segl. de Castilla*, Lib. 3. c. 14., according to L. 11. tit. 1. P. 2. [L. 11. tit. 1. P. 2.] A marquis was lord of some extensive territory on the borders [ 26 ] of the kingdoms. It is said that this word is derived from the German *Marchgraph*, which signifies captain of a frontier. Alluding to this Don Bernardo, Count of Barcelona, in a charter of 794, is called duke, count, and marquis of the Spains. *Mendoza*, same work. *Mexia*, Lib. 1. c. 76. treats of its pre-eminence.

Count is the companion who attends the emperor, or king, daily

<sup>18</sup> *Palacios*, properly, here observes, that the law cited in the text, [L. 61. tit. 4. Lib. 2. *Rec.*; or L. 14. tit. 2. Lib. 6. *Nov. Rec.*] makes use of the word "executor;" the correct translation therefore is, that the officers of justice cannot take in execution or levy upon the dwelling-house of a noble; but vide order in council, 16th September, 1822. Appendix J.

<sup>19</sup> These laws, L. 2. tit. 17. lib. 6. and L. 7. tit. 5. lib. 1. *Nov. Rec.* do not appear to apply.

<sup>20</sup> L. 1. tit. 5. Lib. 10. *Nov. Rec.* does not seem to apply, but L. 6. tit. 5. Lib. 10. *Nov. Rec.* does apply, and supports the position in the text.

performing for him some particular or distinguished service, L. 11. tit. 1. P. 2. [L. 11. tit. 1. P. 2.]

This title is more ancient in Spain than those of duke and marquis. *Mexia*, Lib. 1. c. 77. In the time of the Roman dominion or government, the governors of Spain were distinguished by the title of counts; and thus Dioclesian and Maximilian in L. 14. Cod. de Fid. instrum., called Severus, Count of Spain. In the time of the Goths, the title of count was given to the governors and magistrates of provinces, as also to the principal officers of the royal household; and for this reason the title of count was held in greater estimation than that of duke. *Mendoza*, same work, Lib. 3. c. 5. At present, counts and dukes are appointed to the council of the king, L. 4. tit. 4. lib. 2. *Rec.* [L. 9. tit. 3. lib. 4. Nov. *Rec.*] which points out the reason.

Viscounts were the elder sons of counts (*Mexia*, same work, lib. 1. c. 78.); and they were so called because, according to L. 11. tit. 1. P. 2. [L. 11. tit. 1. P. 2.], the viscount is the officer who supplies the place of count.

By the ordinance respecting the styles of address, which is L. 16. tit. 1. lib. 4. *Rec.* c. 14. [L. 1. tit. 12. lib. 6. Nov. *Rec.*], the grantees, marquises, and counts are alone entitled to the address of my lord (*señoría*): wherefore it is out of mere courtesy that of excellency is now given.<sup>21</sup>

All these nobles administer justice in their estates and seignories by privilege and custom, and in no other way,<sup>22</sup> L. 12. tit. 1. P. 2. [L. 12. tit. 1. P. 2.] This jurisdiction does not extend to the making laws, nor to the granting the privileges of lawful birth, L. 12. tit. 1. P. 2. [L. 12. tit. 1. P. 2.]

The title of "*infanzon*" was also introduced into Castille, which corresponds with the *catanes* and *varvasores* of Italy. The infanzon [ 27 ] cannot exercise authority and jurisdiction without special privilege, L. 13. tit. 1. P. 2. [L. 13. tit. 1. P. 2.]

§ 3. Knights constitute another class of nobility. They owe their institution to the Gothic kings, who being such warriors and chieftains (*caudillosos*), rewarded the desert of valor and arms. In the beginning, knights were chosen one out of every thousand, and, commonly, men of the greatest strength and courage, such as huntsmen, smiths, and butchers, &c., were selected for this post, L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.] But these being found to conduct themselves without any sense or impulse of honor, on account of the meanness

<sup>21</sup> *Palacios* (1) remarks, that by a royal decree of the 5th January, 1786, and by another of the 16th May, 1788, the grantees (*grandes*) are not only entitled to the address of "excellency," but of "most excellent lord" (*excelentísimo señor*), which should be used to designate them in letters or writings; that they long previously received the address of "excellency" by unwritten law, or, which is the same, by custom. That the same law [L. 16. tit. 1. lib. 4. *Rec.*; L. 1. tit. 12. lib. 6. Nov. *Rec.*] points out something of this in these words, "nor excellency to any person who is not a grandee." The learned professor means the prohibition in the law to address any other but a grandee by this style.

<sup>22</sup> They cannot make laws, nor establish new customs, without the consent of the people (*pueblo*).

of their birth, afterwards knights were chosen from among persons of honorable and respectable lineage; who, as they were people of worth (*de bien*), which is the same as property (*algo*), were called *hijosdalgo* L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.] To these species of knights was given the appellation of the gilded spur. *García de Nobil.* Gl. 1. N. 52. They then began to be more respected; and to this situation, or state, is the definition of knighthood adapted by L. 1. tit. 21. P. 2. [L. 1. tit. 21. P. 2.], when it says that it is the association of noble men, who were appointed, or formed, to defend the country. They were more respected than other military men, and were called knights (*caballeros*), on account of its being more honorable to go on horseback (*á caballo*), than on any other beast, L. 1. tit. 21. P. 2. [L. 1. tit. 21. P. 2.]

To distinguish more particularly this noble class, the laws laid down certain ceremonies for the investiture of a knight who possessed the requisite qualifications. He was obliged, the day before he was invested, to keep watch in the church, and to prepare by washing, cleaning, and clothing himself in the best possible manner, L. 13. tit. 21. P. 2. [L. 13. tit. 21. P. 2.] After hearing mass, the person who was arming him, asked him if he wished to be a knight, and having answered in the affirmative, he put on his spur, and girthed on his sword upon his waist, with his head uncovered; and, unsheathing his sword, he swore to be faithful<sup>23</sup> to God, to his king, and to his country. Immediately the knights who were assembled gave him a slap on the neck and a kiss, L. 14. tit. 21. P. 2. [L. 14. tit. 21. P. 2.] The sponsor ungirthed his sword, and he was accounted either a true lord knight, or honorable man, L. 15. tit. 21. P. 2. [L. 15. tit. 21. P. 2.] The new knight was marked with a brand on the left<sup>24</sup> arm, and his name and lineage were inscribed, with that of others, in a book of the place where he was born, in order to know when he was wanting in his duties or obligations, L. 21. tit. 21. P. 2. [L. 21. tit. 21. P. 2.] And it is natural to conclude, that on this is founded the modern enactment of L. 17. tit. 1. lib. 6. Rec.;<sup>25</sup> according to [ 28 ] which, the *audiencias* and *chanceries* ought to take an inventory of knights.

In addition to this degree of nobility (*hidalgua*), in order to being made knights were requisite good conduct, prudence, wisdom, grace, dexterity, and sagacity, loyalty, and skill in arms and horses, Ll. 4, 5. 6. 7. 8. 9. and 10. tit. 21. P. 2. [Ll. 4. 5. 6. 7. 8. 9. and 10. tit. 21. P. 2.] A woman was excluded from conferring knighthood, although she were queen,<sup>26</sup> as also were the insane, the clergy and religious persons, of a regular and not of a military order, L. 11. tit. 21. P. 2.

<sup>23</sup> L. 14. tit. 21. P. 2., quoted in the text, says, the knight swore to die, if necessary, in defence of his laws, his king, and his country.

<sup>24</sup> L. 21. tit. 21. P. 2., quoted in the text, says, the right arm.

<sup>25</sup> Omitted in *Nos. Rec.*

<sup>26</sup> But as queen she might command others to do it. *Vide* L. 11. tit. 21. P. 2. quoted in the text.

[L. 11. tit. 21. P. 2.]: neither could a poor man, one deformed, the merchant, the traitor, and a person condemned to death, be armed knights, L. 12. tit. 21. P. 2. [L. 12. tit. 21. P. 2.]; nor he who had received knighthood unlawfully or in mockery (*por escarnio*), in these three cases: 1st, If the person who armed him had not authority to do so. 2d, If he were unqualified, and, knowing it, received knighthood. 3d, If he purchased or received it through interest, L. 12. tit. 21. P. 2. [L. 12. tit. 21. P. 2.]; and by a modern law persons liable to pay taxes are also prohibited to be armed or created knights, L. 4. tit. 1. lib. 6. Rec.<sup>27</sup>

The obligations of newly created knights, who were called nobles (*nobles*), were, 1st, To respect, honor, assist, and defend him who conferred on them knighthood; except in the cases<sup>28</sup> declared by L. 16. tit. 21. P. 2., [L. 16. tit. 21. P. 2.] and also their sponsors of the sword (*padrinos de Espada*) for three years, L. 16. tit. 21. P. 2. [L. 16. tit. 21. P. 2.] 2d, To ride on horseback, carrying no one behind them. 3d, To succor other poor knights, and to defend what was committed to their charge, L. 21. tit. 21. P. 2. [L. 21. tit. 21. P. 2.] 4th, To take care of their arms and horses, keeping a full suit of armor and besides a mule or pony, L. 21. tit. 21. P. 2. [L. 21. tit. 21. P. 2.] and L. 1. tit. 1. lib. 6. Rec.<sup>29</sup> 5th, To keep their word, not to tell a lie, and to weigh expressions in speaking, L. 22. tit. 21. P. 2. [L. 22. tit. 21. P. 2.] 6th, They ought to go to the wars or to send another in their stead if they have completed seventy years, L. 1. tit. 1. lib. 6. Rec.<sup>30</sup>

In addition to these obligations, knights ought to distinguish themselves above other people in their dress, eating, drinking, and sleeping. Their clothes ought to be fine, their cloak wide, reaching down to their feet, and they must put it on when in the cities or partaking of dinner with others, Ll. 17. and 18. tit. 21. P. 2. [Ll. 17. and 18. [29] tit. 21. P. 2.] Their food consisted solely of substantial flesh eaten at night, it being permitted them to take something in the morning in time of war. Their drink was water mixed with vinegar, the better to quench their thirst, or wine and water. They slept little and on a hard bed, L. 19. tit. 21. P. 2. While they ate they had read to them the histories of great actions, or called upon some of the elders to relate them, and they did the same when they could not sleep, L. 20. tit. 21. P. 2. [L. 20. tit. 21. P. 2.]

They enjoyed many privileges, and the chief consisted, 1st, In being honored even by the kings. 2d, That of sitting down the first in the churches after the king and prebendaries. 3d, Of being allowed to give the embrace of peace (*adorar la paz*)<sup>31</sup>. 4th, Of not having any others seated with them at their table. 5th, Of hav-

<sup>27</sup> Omitted in *Nov. Rec.*

<sup>28</sup> The knowledge of the excepted cases alluded to, is of so little use in the present day, that the Translator is contented to refer the curious to the law quoted in the text.

<sup>29</sup> Omitted in *Nov. Rec.*

<sup>30</sup> Omitted in *Nov. Rec.*

<sup>31</sup> A ceremony used, it is believed, in the high mass in the Romish church.

ing their houses privileged from being broken open by the officers of justice, as also their arms and horses from being taken from them, L. 23. tit. 21. P. 2.<sup>32</sup> [L. 23. tit. 21. P. 2.] L. 9. tit. 1. lib. 8. Rec.<sup>33</sup> [L. 12. tit. 34. lib. 12. Nov. Rec.]<sup>31</sup> 6th, Of being exempted from the payment of taxes, although they may have been liable to pay them, except with respect to things for which nobles (*hijosdalgo*) are bound to pay taxes, L. 1. tit. 1. lib. 8. Rec.,<sup>34</sup> [L. 7. tit. 34. Lib. 12. Nov. Rec.<sup>35</sup>], and from exercising inferior offices, L. 3. tit. 1. lib. 8. Rec.<sup>35</sup> [L. 3. tit. 34. lib. 12. Nov. Rec.<sup>33</sup>]; but by L. 1. tit. 1. lib. 8.<sup>36</sup> Rec. [L. 1. tit. 34. lib. 12. Nov. Rec.<sup>34</sup>] they were obliged to pay those which they were accustomed to do before being made knights, as also their sons. 7th, The privilege of not being subject to being tortured except in the case of treason. 8th, Of not suffering an ignominious death; but in cases of crime which deserved it, they had their heads cut off, or were starved to death; but for the crime of robbery they were thrown into the sea.<sup>37</sup> 9th, That of prescription not running against them when absent in the service of the king.<sup>38</sup> 10th, That of being permitted to make their testaments or last wills without the solemnities of law. All which are treated of by L. 24. tit. 21. P. 2. [L. 24. tit. 21. P. 2.] Many of these privileges subsist to this day.

By L. 1. tit. 1. lib. 6. Rec.<sup>39</sup> It is ordained that these privileges shall not descend to the sons of knights, unless they were born before their fathers were armed or ordained knights.

They forfeited these privileges, 1st, By losing their arms at play or giving them away to women.<sup>40</sup> 2d, By arming one as knight who was not entitled to such honor. 3d, By being a merchant or exercising an inferior office or calling. 4th, By flying from battle. 5th, By surrendering the castle; and, 6th, By not succoring the king if it were possible. In these cases, in order to disarm or degrade the knight, the squire or shield bearer (*escudero*), cut the sword from his side and untied the leather of his spurs, which rendered him unfit for holding civil offices, as explained by L. 25. tit. 21. P. 2. [L. 25. tit. 21. P. 2.]

These ceremonies ceased from the period that Don John II. [ 30 ] reserved to the king alone the right of arming or installing a knight, ordaining that it should be done by his hand, and not by commission,

<sup>31</sup> A ceremony used, it is believed, in the high mass in the Romish church.

<sup>32</sup> This L. 23. tit. 21. P. 2. also extends to them the benefit of restitution.

<sup>33</sup> This L. 12. tit. 34. Lib. 12. Nov. Rec. does not seem to apply.

<sup>34</sup> Nor does this L. 7. tit. 34. Lib. 12. Nov. Rec.

<sup>35</sup> Nor L. 3. tit. 34. Lib. 12. Nov. Rec.

<sup>36</sup> Nor L. 1. tit. 34. Lib. 12. Nov. Rec.

<sup>37</sup> Or were thrown to wild beasts, to be torn to pieces, or devoured. The reader will probably think these no very enviable substitutes for the plebeian mode of capital punishment.

<sup>38</sup> Being allowed the benefit of restitution, as stated in note (32).

<sup>39</sup> Omitted in *Nov. Rec.*

<sup>40</sup> Or staking, or pledging them at taverns.



L. 5. tit. 1. lib. 6. Rec.;<sup>41</sup> but afterwards the Catholic kings made it common to both king and queen, L. 6. tit. 1. lib. 6. Rec.<sup>42</sup>

Formerly challenges, duels, and combats were very common among the knights and Moors; as well as between themselves, when occasion required them to vindicate their honor and character. This is mentioned in tit. 3. and 4. part 7. tit 12. *del* lib. 4. *del Fuero real*; and tit. 9. lib. 7. *del Ordenamiento*.

In modern times duels are prohibited under heavy punishments by the decree of Don Philip V. of 1716 which is Auto 1. tit. 8. lib. 8. Rec.<sup>43</sup> [L. 2. tit. 20. lib. 12. Nov. Rec.]

From this class of knights sprung the orders of knighthood so celebrated in our history; and although they remain to this day, the greatest part of the formalities and solemnities of their institution have ceased, as also the proofs and other things which were required to invest them with the insignia.

Our laws make mention of the knights who were obliged to keep arms and a horse in readiness for war (*caballeros de premia*), those of review and war (*alarde*<sup>44</sup> *y de guerra*), those by virtue of military service (*pardos*), and knights of Andalusia, who were obliged to keep a horse and arms ready to go and defend the coasts against the attacks or incursions of the Moors (*quantiosos*). By knights of *premia*, *alarde* and *guerra*, it appears were understood the other knights of this class, who were obliged to hold themselves in readiness to go to war; who had their privileges, uses and customs, which they were ordered to observe by L. 10. tit. 1. lib. 6. Rec.<sup>45</sup>

From what circumstance they took the denomination of knights *pardos* is not a point ascertained, and still less so when they had their beginning; it only appears that, by a charter of Leon, they were allowed an exemption from taxes if they maintained arms and horses; and it further appears, that this description of military association was composed of persons who paid taxes (*pecheros*). *Garcia de Nobilit.* Gloss. 1. § 1. n. 56. Doña Juana and Don Carlos abolished in 1518 the regiment of knights *pardos*, which Cardinal Ximenes of Cisneros had armed, L. 16. tit. 1. lib. 6. Rec.<sup>46</sup>

The knights *quantiosos* were so called from the fixed rent which they were obliged to possess to maintain a horse and arms, and to [ 31 ] serve in war. This for some time was a thousand ducats (*ducados*) of gold, which were equal to three hundred and seventy-five thousand *maravedis*; and once being made knights of *quantia*, they were obliged to maintain arms and a horse, and to pass in review

<sup>41</sup> Omitted in *Nov. Rec.*

<sup>42</sup> Also omitted.

<sup>43</sup> See also on this subject Ll. 1 and 3., and Notes 1 and 2. tit. 20. lib. 12. Nov. Rec.

<sup>44</sup> A review which took place on the 1st of March in each year, by persons deputed by the king, of all dukes, counts, grandees (*ricos homes*), knights, or squires, and other vassals who held lands, or received pay, at which they appeared well armed and properly mounted, to show themselves ready for a campaign, if called together. *Vide Cornejo Diccionario real de España*, tom. 1. verb. *Alarde*.

<sup>45</sup> Omitted in *Nov. Rec.*

<sup>46</sup> Omitted in *Nov. Rec.*

twice<sup>a</sup> a-year, L. 12. tit. 1. lib. 6. Rec.<sup>48</sup> Being only freed from this obligation when their patrimony was diminished to one hundred thousand *maravedis*. Same law quoted.—But afterwards the sum or quantity of two thousand ducats was required for such knights, and they were relieved from the obligation when their rental fell below two thousand ducats, L. 18. same title and book. On the 28th June, 1613, these knights *quantiosos*, which Philip II. established, were reformed, Aut. 1. tit. 1. lib. 6. Rec. [L. 1. tit. 3. lib. 6. Nov. Rec.] But in 1734, a regiment of knights *quantiosos* was armed in Andalusia with various privileges, noticed in Auto 2. tit. 1. lib. 6. Rec.<sup>49</sup>

§ 4. *Hidalguita* is nobility by descent or lineage, L. 3. tit. 21. P. 2. [L. 3. tit. 21. P. 2.] One of the things which distinguishes nobility from *hidalguita* is,<sup>50</sup> that the latter is acquired on the part of the father alone; for instance, the son of a father who was an *hidalgo*, and of a mother, villein, or plebeian, will be an *hidalgo*,<sup>51</sup> but not a noble.<sup>52</sup> L. 3. tit. 21. P. 2. [L. 3. tit. 21. P. 2.] By *hidalgos* are understood men chosen from good situations in life (*de buenos lugares*), and possessed of property (*algo*), this word so signifying in Spanish, for which reason they were called *hijosdalgo*, which means as much as a son of wealth or property, L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.]

The wise *Octalora*, in his book, entitled *Summa nobilitatis Hispanicæ*, P. 2. c. 4. n. 2. says, that he never read how nor when the *hijosdalgo* had their commencement in Spain. The above quoted, L. 2. tit. 21. P. 2. [L. 3. tit. 21. P. 2.] gives us the etymology of the word *hijosdalgo*; but it is to be remarked, that the poor person, if he be of good lineage, does not lose his quality or rank, for it is sufficient for him if the person from whom he descends had property (*algo*), because the nobility of *hidalguita* does not proceed from the *hidalgo* himself, but from the first of his family chosen as such, L. 2. tit. 21. P. 2. [L. 2. tit. 21. P. 2.] And the *hidalguita* being inherited, it is certain that the manufacturers of cloths, cloth and other woven things will not lose it, as set forth in Aut. 2. and 6. tit. 12. lib. 5. Rec.<sup>43</sup> [L. 1 and 3. tit. 24. lib. 8. Nov. Rec.]

This property, or *algo*, which consisted most frequently of the seigniorie or dominion (*el señorio*) of vassals, was of three kinds, 1st, The dominion of the inheritance or patrimony (*devisa*), which is the inheritance that devolves to a man on the part of his father, or [ 32 ] mother, or grandfathers, or others from whom he descends, which is

<sup>a</sup> Vide Note 44., page ante.

<sup>48</sup> Omitted in *Nov. Rec.*

<sup>49</sup> Omitted in *Nov. Rec.*

<sup>50</sup> At the present time, says *Palacios* (1), the one is commonly confounded with the other, and the same is understood by the word "*hidalgo*" as by the word "*noble*."

<sup>51</sup> But not *vice versa*. So that this is an exception to the general rule, that *partus sequitur ventrem*. Vide L. 3. tit. 21. P. 2. *Greg. Lop.* Gl. 3. on this law, says, that with respect to honors and dignities, the son follows the condition of his father.

<sup>52</sup> *Hidalguita* was therefore an inferior class of nobility.

<sup>53</sup> But it would appear by L. 1. tit. 24. lib. 8. Nov. Rec., referred to in the text, that *hidalgos* are not permitted to engage in any personal employment or service with respect to such manufactures, but must employ others for the purpose, otherwise they will forfeit their nobility.

divided among them. 2d, Dominion, or right of habitation (*señorío de solar*), which species of property consisted in the right of inhabiting or dwelling on another's lands (*suelo*). 3d. The dominion over a town, the inhabitants of which were invested with a right of electing their own magistrates (*señorío de behetría*), which means an inheritance belonging to one independently of or free from the person who lives on it, and who may receive as lord whoever may be of most service to him,<sup>54</sup> L. 3. tit. 25. P. 4.<sup>55</sup> [L. 3. tit. 25. P. 4.]

By reason of these seigniories the *hijosdalgo* were called noblemen (*ricosshomes*).<sup>56</sup> *Garcia de Nobil.* Gl. 18. n. 20. and also barons, L. 10. tit. 24. P. 4. [L. 10. tit. 25. P. 4.] These noblemen or grandees, if they were driven from the kingdom by the king, might be followed by their vassals, and who under their orders might serve another king; and even, in case of war, against him who expelled them, L. 11. tit. 25. P. 4.<sup>57</sup> [L. 11. tit. 25. P. 4.] It is true the vassals were not obliged to follow them, and indeed ought not to do so, if the grandee or (*ricohome*) went into the dominions of the Moors, Ll. 12. and 13. tit. 25. P. 4. [Ll. 12 and 13. tit. 25. P. 4.]

Besides this species of *hidalguía* by lineage, there was another at will (*por merced*), of which such an abuse was made that the Catholic kings not only thought fit to revoke those granted by Don Henry, L. 7. tit. 2. lib. 6. Rec., [L. 7. tit. 2. lib. 6. Nov. Rec.] but also Don Juan IId, and Don Carlos, and Doña Juana revoked those they had given without just cause, and it was absolutely forbidden to grant charters or privileges of *hidalguía*, L. 8. tit. 2. lib. 6. Rec. [L. 5. tit. 2. lib. 6. Nov. Rec.]

Many are the privileges and liberties of the *hijosdalgo*, which ought to be preserved to them inviolate, according to Ll. 13. and 14. tit. 2. lib. 6. Rec. [Ll. 13 and 15. tit. 2. lib. 6. Nov. Rec.] The *hijosdalgo* by lineage were not compelled or obliged to go to the war, as were those *at will*, or by privilege (*de merced ó privilegio*), *Otalora*, Part. 3. c. 4. n. 2., nor could their horses or arms be taken for debt or for security that did not regard the crown, L. 9. tit. 1. lib. 6. Rec.<sup>58</sup> [L. 1. [33] tit. 2. lib. 6. Nov. Rec.] They ought to have a separate prison,

<sup>54</sup> The subject of *Behetrías* is a matter which, to this present day, has not been treated of in a masterly way by historians and lawyers. It is worthy of our attention; and therefore, in the publication we have made of the *Fuero viejo de Castilla*, we have endeavored to satisfy, as much as possible, the curious and lovers of our antiquities by means of a dissertation therein inserted, upon the origin, duration, and exemptions of this kind of seignior and its dependencies. There will be seen the information which would here, perhaps, be prolix, upon the tributes of *behetría* and vassals inhabiting the soil, or having the right of habitation upon it." [Note in the text.]

<sup>55</sup> I have endeavored to explain, as well as I could, these different terms in the text, of *devisa*, *solariego*, and *behetría*, but I fear I have not succeeded in making the subject very intelligible; however, I think it is one in which very few of my readers will take any interest.

<sup>56</sup> This word, *ricohome*, according to L. 10. tit. 25. P. 4., referred to in the text, is equivalent to that of count or baron in other countries.

<sup>57</sup> Vide also L. 10. tit. 25. P. 4.

<sup>58</sup> Vide also Ll. 13. 14. and 15. tit. 2. lib. 6. Nov. Rec.

L. 11. tit. 2. lib. 6. Rec. [L. 11. tit. 2. lib. 6. Nov. Rec.] They do not pay duties or taxes for the goods or property which they may have bought from persons liable to pay them, L. 14. tit. 14. lib. 6. Rec. [L. 3. tit. 18. lib. 6. Nov. Rec.] These privileges cannot be renounced, L. 14. tit. 2. lib. 6. Rec. [L. 15. tit. 2. lib. 6. Nov. Rec.] although formerly they might, according to the rule laid down by *Villadiego* on L. 8. *Prol. del Fuero Juzgo*. n. 61. and then in use.

With respect to the proofs of nobility and *hidalguía* we defer speaking until the 3d book, where we are of opinion it will be more suitable to treat of them.

§ 6. Under the name or term plebeians (*plebeyos*) we understand all those who exercise any trade (*arte*) or who cultivate the soil,<sup>59</sup> which two kinds the *Partidas* explain by the expressions of work (*obra*) and labor (*labor*). Works or trades (*obras*) are those which men carry on in houses or covered places. Labors (*labores*) are all those things which men do by reason of the mode of labor (*de fechoria*), or of the time in which they receive the work, having to traverse the mountains or the fields, and being obliged to suffer cold and heat according as the weather is. The latter are called laborers (*labradores*), and the former mechanics or handicraftsmen (*menestrales*), because they seek their means of support (*su menester*) in the trade or art, L. 5. tit. 20. P. 2. [L. 5. tit. 20. P. 2.]

Conforming to the laws which are at this day in force, we will only observe that this definition of labor makes us well understand how anxious Don Alonso the Wise was to represent to us the labor, suffering, and toil with which laborers procured us all that was necessary to maintain and preserve our lives; constituting them, for this reason, a more noble class than mere mechanics. Hence, without doubt, proceed the privileges and exemptions of laborers, among which the following are the principal, 1st, That they may not be comprehended in those drawn to serve in the army, (*en quintas*), which was granted them on the petition of seven of the Cortes of Burgos, in 1429 and 1430. 2d, That execution cannot go against them<sup>60</sup> in harvest time, except for debts due to the crown, or proceed-

<sup>59</sup> This word may be more properly translated "commons." *Palacios* says, that by the term "*plebeyos*," is merely understood those who are not "*nobles*," and that the mere exercise of any art, trade, or calling, does not constitute a plebeian, nor deprive one of the privileges, &c. of nobility, which he may possess. He refers to a royal *cédula* of 1783, which he states repeals L. 6 and 9. tit. 1. lib. 4. *del Orden real*, and L. 2 and 3. tit. 1. lib. 6. Rec. (Nota 5. tit. 23. lib. 8. Nov. Rec.)

<sup>60</sup> This must mean with respect to their persons merely, and then only for debt arising from, or imposed in consequence of the commission of crime; for there is no exception from arrest in favor of the crown in the harvest time, which is from July to the end of December. See the second section of the act, or L. 15. tit. 31. lib. 11. Nov. Rec.; and L. 16. tit. 31. lib. 11. Nov. Rec. extends this privilege from arrest to the whole period of the year, except in the case of crime, or where the debt was contracted before the party became a laborer or husbandman. The first section of this Law 15. tit. 31. lib. 11. Nov. Rec. exempts from execution or levy at any period of the year, except for debts to the crown, for rent to the landlord or owner of the land, or for money lent by him to assist the laborer in his cultivation, the oxen, mules, or other beasts of the plough, and the agricultural implements of the laborer or husbandman, as also his fields sown with grain, or

ing from crime. Ll. 25. and 26. tit. 21. lib. 4. Rec. [L. 15. tit. 31. lib. 11., and L. 6. tit. 11. lib. 10. Nov. Rec.] The ordinance of 28th August, 1603, makes mention of this privilege, which it extends to the farmers of wine and vinegar, upon which articles was imposed the grant [ 34 ] of the eighteen millions which had been given to the king in the previous Cortes. 3d, That their implements of agriculture, beasts of labor, and the bread they bake, are exempt from being taken for civil debt, or in an executive suit, except for a debt due to the crown, or for the payment of the ten per cent. to the king (*diezmos*) and ecclesiastical or seignorial rents,<sup>61</sup> L. 25. 26. and 28. tit. 21. lib. 4. Rec. [L. 15. tit. 31. lib. 11., L. 6. tit. 11. lib. 10., L. 16. tit. 31. lib. 11., L. 7. tit. 11 lib. 10 , and L. 8. tit. 19. lib. 7. Nov. Rec.]

Our laws have not been less attentive to forming regulations respecting trades, which, formerly, were divided according to their nature or kind into associations, corporations, or companies: their by-laws, (*estatutos*), which varied in each of them, constituted the form of their government, the admission of journeyman to be masters, and other things which belonged to their interior and exterior employments; but the royal approbation was always necessary to their validity. There are, however, some general laws on the subject: 1st, That no person shall hold or exercise two employments or callings at the same time, L. 12. tit. 13. lib. 5. Rec.;<sup>62</sup> not even those which had a certain connection or dependence upon one another, by reason of the goods or articles they made use of; an example of which is given in L. 1. tit. 11. lib. 7. Rec. [Note 7. tit. 23. lib. 8. Nov. Rec.] 2d, Every journeyman or mechanic must work within the place where hired or employed from sun-rise to sun-set; and if without or beyond it, until such hour as will allow for his return by its setting, under penalty of loss of one-fourth of his day's wages, L. 2. tit. 11. lib. 7. Rec. [L. 1. tit. 26. lib. 8. Nov. Rec.] 3d, That the town councils (*los concejos* or *cabildos*) shall fix their wages according to the price of provisions in the district, (*comarca*), L. 3. tit. 11. lib. 7. Rec., [L. 4. tit. 26. lib. 8. Nov. Rec.] 4th, That every journeyman or day laborer shall be paid on the night of the day of his work, if he wishes it; and that no such person can be elected to a public office in the town (*por oficio del comun*) under penalty of twice the amount; (*pena del doble*;) and that no master workman may employ more than twelve each day, L. 4. tit. 11., and L. 10.<sup>63</sup> tit. 3. lib. 7. Rec. [L. 2. tit. 26. lib. 8., and L. 4. tit. 9. lib. 7. Nov. Rec.] Upon the various handicraft works, see tit. 13. 14. 15. 16. 17. 18. 19. 20. and 23. lib. 7. Rec.<sup>64</sup>

CAP. 4. The third division of men, according to the civil state of

ploughed in order to be sown (*sembrados y barbechos*); and even the three above excepted cases, one pair of oxen, mules, or other beasts of the plough, must be left to him.—*Vide* Appendix J.

<sup>61</sup> *Vide* Appendix J.

<sup>62</sup> Omitted in *Nov. Rec.*

<sup>63</sup> L. 10. tit. 3. lib. 7., nor its corresponding Law in the *Nov. Rec.*, does not seem to apply.

<sup>64</sup> Few of these are inserted in the *Nov. Rec.*

persons, into lay and ecclesiastic, will be found supported by L. 2. tit. 23. P. 4. [L. 2. tit. 23. P. 4.] Ecclesiastics are those who compose the hierarchial state of the church. They are called clergy, (*clerigos*), which means men chosen for the service of God, L. 1. tit. 6. P. 1. [L. 1. tit. 6. P. 1.]

§ 1. The ecclesiastics are regular or secular. The regular are those who leave or abandon all earthly things, and adopt some rule of religion to serve God, promising to observe it, L. 1. tit. 7. P. [ 35 ] 1. [L. 1. tit. 7. P. 1.] To the first kind belong monks, friars, and regular canons, whom our laws call canons of the cloister, (*de claustra*), L. 1. tit. 7. P. 1. [L. 1. tit. 7. P. 1.] which in the present day scarcely subsists.

The ecclesiastical privileges are confined to the peculiar jurisdiction, (*á su fuero*), immunities, and exemptions, which they enjoy immediately by royal grant, L. 50. tit. 6. P. 1. [L. 50. tit. 6. P. 1.] Of their jurisdiction, or judicial power, we shall say something in its place in the third book. We shall say nothing of their immunities, conceiving that they belong to the canon, or ecclesiastical law of Spain. With respect to their exemptions, we must observe that the exemption from payment of excise duties (*alcabalas*) is granted them by L. 6. tit. 18. lib. 9. Rec.; [L. 8. tit. 9. lib. 1. Nov. Rec.]; and this is understood with respect to the sale of their property, and the fruits or products of their estates; but not the produce which they may derive from lands rented, nor their traffic, or gains of any kind, according to the decree of the *Presidents*, which is L. 1. tit. 18. lib. 9. Rec.<sup>as</sup> which is ordered to be observed by *cédula* of 20th July, 1763, which directs depositions on oath to be taken of the rents of ecclesiastics; and if they should be false, that the judges proceed to verify and value the property by experienced or competent persons on oath. This exception from the payment of excise, or duty on sales of articles, (*alcabala*), is not extended to the clergy of the minor orders, L. 2. tit. 4. lib. 1. Rec. [L. 7. tit. 10. lib. 1. Nov. Rec.]

According to the instructions and royal decrees of 1745, 1751, and 1760, which declare the art. 8. of the *concordate* of 1737, all property belonging to ecclesiastical foundations antecedent to that period is exempt from tributes; but that acquired subsequently to the said year 1737 shall be subject to contribution; and thus the clergy shall be obliged to contribute and to assist the laity in what is paid or furnished for the quartering of soldiers, (*via de utensilios, quartelas*), brandy, (*aguardiente*), (*mejoras de fundos*), (*censos*),<sup>as</sup> &c. They shall equally be obliged to contribute to public works for the public or common benefit, L. 12. tit. 3. lib. 1. Rec.; [L. 7. tit. 9. lib. 1. Nov. Rec.]; and to pay the duties of export on what they shall send out of the kingdom, Aut. 4. tit. 18. lib. 9. Rec. [L. 14. tit. 9. lib. 1. Nov. Rec.] With regard to the benevolence or subsidy to assist in

<sup>as</sup> Not in *Nov. Rec.*

<sup>as</sup> I cannot find appropriate terms in English for these words.

carrying on the war against infidels, (*gracia del Escusado ó Casa* [ 36 ] *dezmera*,) of apostolic grant, see the decree of January, 1761, and *Martínez* in his *Librería de Jueces*, tom. 2. c. n. 84. to 92.

It is to be observed, that the regular clergy cannot be agents or attorneys, except in causes and affairs of their chapters and societies, presenting first the licence of their superior, Aut. 1. and 2. tit. 3. lib. 1. Rec.; [L. 1. tit. 27. lib. 1. Nov. Rec. ;] and the royal *cédula* of 25th November, 1764.

The regular clergy are also forbidden to live out of their convents under any pretext, *cédula* of 4th August, 1767; and to ask alms with poor's boxes without permission of the town council, (*del consejo*,) decree of 16th September, 1766.

Lastly, They are not considered as inhabitants of the towns, according to the royal *cédula* of 21st December, 1766; all which remarks we have made here, considering that these points could not be treated of with more method in another place.

## TITLE VI.

## OF PROMISE OF MARRIAGE OR ESPOUSALS (DESPOSORIO) AND MARRIAGE (MATRIMONIO).

CAP. 1. MEN in the third place are considered with respect to their state as a family; and in this point of view, are either married or single. To this division belongs matrimony, which is accompanied commonly by marriage portions (*dotes*) and donations *propter nuptias*, which we term jointure (*arras*): wherefore, proceeding immediately to explain espousals or mutual promise of future marriage (*el desposorio*), as antecedent to marriage, we will treat of both in the present chapter, leaving for the following the explanation of the marriage portion of the wife (*dote*) and jointure (*arras*).

We consider matrimony as a contract which is celebrated between those who have contracted espousals (*los desposados*), and from which it derives its force and efficacy; but authorised by the church, which gives it a worthy place among its sacraments by reason of its dignity, mystical signification, and its ends, L. 5. tit. 1. P. 4., Ll. 3. and 4. tit. 2. P. 4. [L. 5. tit. 1. P. 4. Ll., 3. and 4. tit. 2. P. 4.]

§ 1. Under the consideration of contract, as we shall treat it here, leaving for the canonists all that it contains with respect to the sacrament and the church,<sup>1</sup> a solemnity testifying the will of the contracting parties ought to precede marriage, which we call mutual promise of future marriage or *espousals*<sup>2</sup> (*desposorio*); and that is the verbal promise which men make when they wish to marry, L. 1. tit. 1. P. 4. [L. 1. tit. 1. P. 4.] We must except from this general definition the dumb, who by means of evident and clear signs, supply the place or pronouncement of words, L. 5. tit. 2. P. 4. [L. 5. tit. 2. P. 4.]

From this definition we deduce the following axioms:—1st, That promise of future marriage is a consent which those who are [ 43 ] betrothed give with the desire of being married. 2d, That it ought to precede matrimony. 3d, That it is a mere pact celebrated without the solemnity of law;<sup>3</sup> but of such force, that by reason of it the persons who are betrothed are bound to contract matrimony afterwards.

<sup>1</sup> "Following in Spain the rules of the church in what appertains to the efficacy or validity of matrimony, and treating of the impediments of marriage, we cannot lay aside what it possesses in relation to the church." *Palacios* (1).

<sup>2</sup> *Vide* Wood, C. L. Book 1. ch. 2. p. 118. fo. ed. (*Palacios* here observes, that it is true espousals ought to precede matrimony when they are contracted; but that no one can infer from this that marriage cannot be celebrated without having previously contracted espousals.)

<sup>3</sup> "Promise of future marriage (*desposorio*) is not a mere pact, it is a contract with its proper nomination, which ought not to be celebrated without the solemnities which the law prescribes." *Palacios* (2).



Promise of future marriage being a consent given by those who are betrothed, it is evident, 1st, That only they can celebrate it who are of an age to consent; and therefore the male or female above seven years of age may celebrate it, or even under that age, if, after completing it, they ratify their consent, L. 6. tit. 1. P. 4. [L. 6. tit. 1. P. 4.] 2d, But not persons of non sane mind; unless after recovering their reason they renew their promise, L. 6. tit. 2. P. 4. [L. 6. tit. 2. P. 4.] 3d, That the father cannot betroth his daughters unless they be present and consent, L. 10. tit. 1. P. 4. [L. 10. tit. 1. P. 4.] But if the father should swear and promise to marry one of his daughters with another person, and they shall consent, the election of the particular daughter is left to the will of the father, if he have not specified the object of his promise; provided that in this case, if only one of the daughters remain alive, he would be obliged to give her in marriage, and if, after the promise, he should particularise one of his daughters, and the man does not wish to have her for a wife, the father is absolved from the obligation; but if the man, before the selection shall have been made, shall have enjoyed or had connection with any one of the daughters, he shall be obliged to take her for a wife and no other, L. 11. tit. 1. P. 4. [L. 11. tit. 1. P. 4.] 4th, That it may be also provided that the espousals may take effect at the discretion of the father, if any of the contracting parties say, "I will take you for my husband or wife, if it please my father," L. 3. tit. 1. P. 4. [L. 3. tit. 1. P. 4.]

This consent being precedent to matrimony, it follows, 1st, That mutual promises of marriage may be either *de presenti* or *de futuro*,<sup>4</sup> Ll. 2. and 3. tit. 1. P. 4. [Ll. 2. and 3. tit. 1. P. 4.], the difference of which is explained by L. 9. tit. 1. P. 4. [L. 9. tit. 1. P. 4.] 2d, That they may be celebrated in four ways, by condition, cause, manner, or demonstration, Ll. 1. and 2. tit. 4. P. 4. [Ll. 1. and 2. tit. 4. P. 4.] Condition is, an agreement or covenant, which is made dependent on another covenant; for example, when a person says, "I promise to marry you if you should be at Rome." Cause is, when a person says, "I promise to marry you, because you have done such a thing." Manner is, when a person says, "I give you a hundred maravedis to

<sup>4</sup> Properly, espousals, or mutual promises of marriage (*desposorio*) are, by words, *de futuro*; espousals by words, *de presenti*, are considered in the light of marriage (*casamento*), Vide L. 2., as also L. 3. tit. 1. P. 4.; and if when a man contract espousals with one woman by words *de futuro*, and afterwards contract them by words *de presenti* with another woman, the last shall be valid, or take effect in preference to the first, unless the man should have had connection with the woman with whom he contracted by words *de futuro*, before he contracted espousals with the second woman by words *de presenti*. And if a man contract espousals by words *de futuro* with two women, he may elect to marry either of them he pleases, unless he hath had connection with one of them; for in such case, he shall be obliged to marry her with whom he has had connection. Vide L. 9. tit. 1. P. 4. Palacios observes on this part of the text, "It is certain, that as well in the civil as in the canon and statute law, this difference and improper division of espousals, *de presenti* and *de futuro*, are to be met with, by espousals *de presenti* marriage itself being understood; but that, therefore, it must not be said, that because the consent or agreement of espousals precedes matrimony, it follows, that espousals are *de presenti* or *de futuro*; because, if it precedes, they cannot be *de presenti*."

build me a house." Demonstration is, when one says, "I [ 44 ] promise to give you such a thing, which I bought of such an one," naming both particularly, L. 2. tit. 4. P. 4. [L. 2. tit. 4. P. 4.] The conditions ought to be just or decent (*honestos*), and conformable to the nature of espousals or mutual promise of future marriage (*desposorio*), Ll. 3, 4, and 5. tit. 4. P. 4. [Ll. 3, 4, and 5. tit. 4. P. 4.] 4th, Indecorous and impossible conditions do not vitiate or annul the promise or contract of marriage, but are considered as not to exist, L. 6. tit. 4. P. 4. [L. 6. tit. 4. P. 4.]

Promise of marriage being a mere pact (*pacto*), it may be celebrated with or without oath, L. 10. tit. 1. P. 4. [L. 10. tit. 1. P. 4.], and between absent persons by attorney or by power (*carta*), L. 1. tit. 1. P. 4. [L. 1. tit. 1. P. 4.] The effect of this promise is, the mutual obligation which arises between the parties to contract matrimony; and hence it is, 1st, That those betrothed are prohibited to marry with another, unless the second promise be made under an oath, and the first without it,<sup>5</sup> L. 8. tit. 1. P. 4. [L. 8. tit. 1. P. 4.] 2d, That the canonical and civil impediments which hinder and dissolve marriage, also hinder and dissolve espousals, Ll. 8. and 12. tit. 1. P. 4. [Ll. 8. and 12. tit. 1. P. 4.] compared with Ll. 11, 12, 13, 14, 15, 16, and 17. tit. 2. P. 4. [Ll. 11, 12, 13, 14, 15, 16, and 17. tit. 2. P. 4.] 3d, That their causes are of ecclesiastical cognisance, L. 7. tit. 1. P. 4. [L. 7. tit. 1. P. 4.] 4th, That espousals celebrated in any of the lawful ways which we have mentioned, do not bind, unless the condition, cause, demonstration, or manner, with which the promise was made be fulfilled, L. 3. tit. 4. P. 4. [L. 3. tit. 4. P. 4.]

§ 2. Marriage is the conjunction of man and woman, made with the intention to live always together, and not to separate; observing chastity one to the other, and not cohabiting with any other woman or man, living both together, L. 1. tit. 2. P. 4.<sup>6</sup> [L. 1. tit. 2. P. 4.]

Upon this definition are founded the following principles, 1st, That no one who is impotent can contract marriage, procreation being the end of matrimony. 2d, That this perpetual union cannot be dissolved, if marriage be lawfully contracted. 3d, That to render the marriage valid, will and consent must concur in the pronouncement of the promise. 4th, That it be not done clandestinely. 5th, That in order that there may be no separation of marriage, fidelity be [ 45 ]

<sup>5</sup> The law referred to, appears to me to declare the reverse, and to say, that an oath taken in the face of the previous promise, as in violation of law (*sin derecho*), is not binding. Vide L. 8. tit. 1. P. 4. The foregoing opinion has been since confirmed by the observations of Palacios on this part of the text. He adds, that "espousals are also an impediment to matrimony, but that they are an impediment of an impeding nature (*impediente*), commonly so termed; which means, that if, in defiance of this impediment, marriage should be contracted, it would be contracted unlawfully, but it would not be annulled."

<sup>6</sup> See by this law a person who, after celebration of marriage without consummation or carnal connection, if desirous, is allowed to enter into religious or holy orders; and the woman is permitted to marry another man. Secus, if the marriage hath been consummated *concubitu*.

observed between man and wife. 6th, That the marriage cannot take place if there exist any canonical or civil impediment.

From the first principle these consequences are deduced, 1st, That the male under fourteen, and the female under twelve, cannot contract marriage, although, if before this age they should possess capacity, they may marry,<sup>7</sup> L. 6. tit. 1. P. 4. [L. 6. tit. 1. P. 4.] 2d, Nor the person castrated, unless there arise capacity in him afterwards to procreate,<sup>8</sup> L. 4. tit. 8. P. 4. [L. 4. tit. 8. P. 4.] 3d, Nor the impotent from injury or bodily defect, frigidity, weakness, narrowness, and other impediments treated of in tit. 8. P. 4. [Tit. 8. P. 4.]

From the second principle it arises, 1st, That no infirmity or disease which happens after the consummation of matrimony can dissolve it, L. 7. tit. 2. P. 4. [L. 7. tit. 2. P. 4.], although the parties may live separate if the disease be contagious, or the church shall adjudge separation,<sup>9</sup> L. 7. tit. 2. P. 4. [L. 7. tit. 2. P. 4.] 2d, That the wife shall enjoy the same condition, state, and dignity, as the husband, although, before marriage, they may have been unequal in situation, L. 7. tit. 2. P. 4. 3d, That the marriage consummated, but not that which is only duly solemnized (*rato*), is indissoluble as to the tie or chain (*al vinculo*), but not with regard to cohabitation, L. 4. tit. 1. P. 4. [L. 4. tit. 1. P. 4.]

From the third principle it is inferred, 1st, That the consent will not be sufficient without the will to marry,<sup>10</sup> L. 5. tit. 2. P. 4. [L. 5. tit. 2. P. 4.] 2d, That the order of the king for a widow or virgin to marry against her will is not valid, L. 10. tit. 1. lib. 5. Rec. [L. 2. tit. 2. lib. 10. Nov. Rec.] 3d, That the lord cannot compel his vassal or tenant to marry, L. 11. tit. 1. lib. 5. Rec. [L. 3. tit. 2. lib. 10. Nov. Rec.] 4th, That this will may be expressed by words, or by signs by those who may be dumb, L. 5. tit. 2. P. 4. [L. 5. tit. 2. P. 4.] 5th, That this consent may be effectuated by a relation or stranger marrying in the name of the party, having a special power for that purpose, L. 5. tit. 2. P. 4. [L. 5. tit. 2. P. 4.] 6th, That this consent is considered wanting if there be an error as to the person, but not with respect to the quality or rank,<sup>11</sup> L. 10. tit. 2. P. 4. [L. 10. tit. 2. P. 4.]

<sup>7</sup> "But for this," says *Palacios*, "the previous decision (*juicio*) of the church is requisite, which belongs to the bishop." He cites *Benedict XIV. Bul. magna nobis* LI. tom. 2. bullar.

<sup>8</sup> "This exception," observes *Palacios*, "cannot take place; because, for this capacity to supervene on castration, is repugnant; and that, therefore, L. 4. tit. 8. P. 4., cited in the text, does not make any exception."

<sup>9</sup> *Palacios* states, that separation in respect to cohabitation, from whatever cause it may proceed, must always be effected by the sentence of the church, and not by the mere authority of the parties: he cites *Caval. Ins. jur. can. part. 2. cap. 30. § 14. Bererd. cit. tom. 3. dissert. 7. cap. 1.*

<sup>10</sup> Perhaps, remarks *Palacios*, something else was intended to be said, because there cannot be consent without the will.

<sup>11</sup> And sometimes, also, if there should be an error with respect to the quality or rank, as if believing to contract with the daughter of the prince, it should be afterwards discovered that she were not so, or believing the person to be free, who should afterwards be found to be a slave. Such mistakes show that the consent was wanting. *Palacios* (2).

From the 4th principle we deduce 1st, That secret marriages are forbidden for the just reasons set forth in L. 1. and 5. tit. 3. P. 4. [L. 1. and 5. tit. 3. P. 4.] as are also those which are celebrated without witnesses, without the permission of the father, mother, or relations to whose charge the woman betrothed is committed;<sup>12</sup> or without giving notice of it in the parish church of which the contracting parties are parishioners,<sup>13</sup> L. 1. tit. 3. P. 4. [L. 1. tit. 3. P. 4.] [ 46 ] 2d, That besides the ecclesiastical penalties those who marry clandestinely will be also liable to civil ones; and thus not only their children will be illegitimate, L. 3. tit. 3. P. 4. [L. 3. tit. 3. P. 4.] but thus incur the penalty of confiscation of property, banishment,<sup>14</sup> and just cause of being disinherited, L. 1. tit. 1. lib. 5. Rec., [L. 5. tit. 2. lib. 10. Nov. Rec.] which explains what is expressed in L. 1. 2. 5. and 6. tit. 1. lib. 3. *del Fuero real*; which treat of disinheritance in these cases. 3d, That if he who lives with his lord marries his daughter<sup>15</sup> without his command, he incurs the punishment of banishment, and she that of disinherison,<sup>16</sup> L. 2. tit. 1. lib. 5. Rec. [L. 1. tit. 2. lib. 10. Nov. Rec.]

Fidelity (*lealtad*) is broken, when 1st, Adultery is committed, the punishment whereof is canonical,<sup>17</sup> and is treated of with its form of trial (*su juicio*) in L. 8. and 19. tit. 2. and L. 2. tit. 9. P. 4. [L. 8. and 19. tit. 2., and L. 2. tit. 9. P. 4.] 2d, Much more is it broken when either of the married parties shall marry again during the life of the other, which crime is visited by the civil laws with the penalties which we will explain in the last title of our 2d book, and which are expressed in L. 5. 6. and 7. tit. 1. lib. 5. Rec.<sup>18</sup> [L. 6. 7. 8. tit. 28. lib. 12. Nov. Rec.]

According to the 6th principle the canonical impediments to marriage are comprised under the following;<sup>19</sup> 1st, Carnal or spiritual

<sup>12</sup> The want of such permission, observes *Palacios*, would not render the marriage null or clandestine. Clandestine marriage, according to the Council of Trent, is only considered that which is celebrated without the presence of the priest (*parroco*) and two witnesses, sess. 24. *De Reform. Matrim.* cap. 1.

In respect to the necessity of paternal consent in regard to minors, or persons under particular ages in cases of matrimony, the learned professor refers to L. 18. tit. 2. lib. 10. Nov. Rec.

<sup>13</sup> Publication of banns.

<sup>14</sup> And this punishment extends to the witnesses of such clandestine marriage, *Vide* L. 5. tit. 2. lib. 10. Nov. Rec.

<sup>15</sup> Or his female relation (*pariente*) living in the lord's house. *Vide* L. 1. tit. 2. lib. 10. Nov. Rec.

<sup>16</sup> And her property goes to her nearest relations. *Vide* L. 1. tit. 2. lib. 10. Nov. Rec.

<sup>17</sup> And also civil, adds *Palacios*.

<sup>18</sup> By the first law referred to the bigamist is to be branded in the forehead with a hot iron, with the letter Q. By the 2d, He is to be condemned to the punishment of treachery (alive), and to be visited with a loss of half his or her property; and by the 3d, To be condemned to the galleys for five years.

<sup>19</sup> But, observes *Palacios*, the canonical impediments are not limited to these alone. For a due understanding of all the impediments, whether natural, canonical, or civil, he adds, that it is absolutely necessary to consult some of the authors on the subject cited. He particularly refers, for what respects civil impediments, to *Selvag. Inst. can. disciplinæ legibus et consuetudinibus Hispan. accomodat.* Tom. 2. lib. 2. tit. 9.; and to the royal orders posterior thereto.

kindred (*parentesco*),<sup>30</sup> L. 12. and 17 tit. 2. P. 4. and titles 6. and 7. P. 4.<sup>31</sup> [L. 12. and 17. tit. 2. P. 4., and tit. 6. 7. P. 4.] 2d, The crime of incest, L. 13. tit. 2. P. 4. [L. 13. tit. 2. P. 4.] The death of either of the consents occasioned or perpetrated by the other,<sup>32</sup> L. 14. tit. 2. P. 4. [L. 14. tit. 2. P. 4.] 4th, Difference of law or religion,<sup>33</sup> L. 15. tit. 2. P. 4. [L. 15. tit. 2. P. 4.] 5th, The sacred order, L. 16. tit. 2. P. 4. [L. 16. tit. 2. P. 4.] 6th, The solemn vow of religion or chastity, L. 11. tit. 2. P. 4.<sup>34</sup> [L. 11. tit. 2. P. 4.]

The civil impediments are those which proceed from want of understanding;<sup>35</sup> and for this reason madmen, fools, or idiots, &c., cannot contract marriage, L. 6. tit. 2. P. 4. [L. 6. tit. 2. P. 4.]

The civil laws also prohibit marriage in the direct line, and also in the collateral to the fourth degree.<sup>36</sup> But as relationship or kindred embraces two considerations,<sup>37</sup> one with reference to the laws of the laity or common law, and the other with reference to the ecclesiastical law, L. 3. tit. 6. P. 4.; [L. 3. tit. 6. P. 4.;] and as in respect of marriage the rules of the canon law are followed, leaving those of the civil or common law to govern the cases of succession *ab intestato*, it has appeared to us more regular to defer the explanation of the [ 47 ] degrees of consanguinity and affinity until we come to speak of these successions.

Matrimonial causes are exclusively of ecclesiastical cognisance,<sup>38</sup> and therefore it is not within the province of our institute to touch upon them. See Titles 9. and 10. P. 4. [Tit. 9. and 10. P. 4.]

<sup>30</sup> To the fourth degree, and this impediment holds with respect to adopted relations. By spiritual kindred is meant god-fathers and god-daughters, &c.

<sup>31</sup> Another impediment to matrimony is also noticed by L. 12. and 17. tit. 2. P. 4. from motives of public honesty or decency.

<sup>32</sup> Impedes a second marriage on the part of the survivor, it is presumed.

<sup>33</sup> That as regards a person not Christian, L. 15. tit. 2 P. 4. forbids the marriage of a Christian with a Jew, Moor, or person who is not a Christian; but it allows a Christian to contract espousals with such person, on the condition or covenant, that such infidel will become a convert to Christianity before actual marriage.

<sup>34</sup> L. 11. tit. 2. P. 4. mentions another impediment which, perhaps, ought not to be classed under canonical disabilities: the impediment I allude to, is the marriage of a free person with a slave, unless the party free be cognizant of the condition of the other, and consent to the marriage, or have carnal connection with ditto. *Vide* the law referred to.

<sup>35</sup> Palacios says these impediments are natural.

<sup>36</sup> In the direct line they prohibit it, in *infinitum*, Palacios, (1).

<sup>37</sup> That is in respect of the modes of computation adopted by the civil and canon laws, which differ in respect to transversal or collaterals, but agree in respect of direct ascendants or descendants. *Vide* L. 3. tit. 6. P. 4.

<sup>38</sup> This proposition appears rather too generally expressed; for it would seem from the *Præm* to the 10th Title of the 4th Partida, that there is an exception, where, after making the general statement in the text, which is also supported by the 9th Title of the 4th Partida referred to, it is said, "unless (*fuera ende*) the impediment concern a matter which belongs to lay jurisdiction or decision, such, for instance, as one with regard to adultery." *Vide* *Præm* tit. P. 4. On this part of the text, it is observed by Palacios, that the causes or trials of those who contract a second marriage during the life of the first wife, are, by a royal cedula of 5th February, 1770, (L. 10. tit. 28. lib. 12. Nov. Rec.), declared exclusively of royal, or lay, and military jurisdiction, according to the persons who offend; but that by the royal decree of 10th December, 1781, [which does not, however, appear in the *Nov. Rec.*], the ecclesiastical jurisdiction may also take cognisance of the mode, and for the reason expressed by the same decree.

Marriage being so advantageous to the welfare of the state, our laws favor it in various ways, and thus 1st, The L. 5. tit. 1. lib. 3. Rec.<sup>20</sup> [L. 26. tit. 2. lib. 5. Nov. Rec.] annuls entirely L. 13. tit. 1. lib. 3. *del fuero real*, and L. 3. tit. 12. P. 4., [L. 3. tit. 12. P. 4.,] which prohibited widows from marrying within a year after the death of their husbands, and the civil penalties which they incurred thereby; and L. 4. tit. 1. lib. 5. Rec., [L. 7. tit. 4. lib. 10. Nov. Rec.,] reserves to the children of the first marriage the dominion of the property which the wife shall have belonging to the first husband, which reservation is also understood to apply to the husband. 2d, All married persons are exempted from corporation or city burthens and offices<sup>21</sup> (*cargas concegiles*) the first four years of their marriage; and, the first two, from royal<sup>22</sup> taxes (*pechos reales*) and tribute-money,<sup>23</sup> (*moneda forera*), which exemption they will enjoy for life if they come to have six sons, L. 14. tit. 1. lib. 3. Rec. [L. 7. tit. 2. lib. 10. Nov. Rec.] 3d, If they marry before eighteen they may administer their own property when they arrive at that age, L. 14. tit. 1. lib. 3. Rec. [L. 7. tit. 2. lib. 10. Nov. Rec.] 4th, Sons married or<sup>24</sup> betrothed (*velados*) have the usufruct of adventitious<sup>24</sup> property, (*adventicios*), Ll. 8. and 9. tit. 1. lib. 5. Rec. [L. 3. tit. 5. lib. 10. Nov. Rec.]

<sup>20</sup> L. 5. tit. 1. lib. 3. Rec., which is L. 26. tit. 2. lib. 5. Nov. Rec., does not apply; the reference, it is presumed, should be L. 3. tit. 1. lib. 5. Rec.; or L. 4. tit. 2. lib. 10. Nov. Rec., which see.

<sup>21</sup> See Law 7. tit. 2. lib. 40. Nov. Rec.

<sup>22</sup> Also corporate or city imposts, same Law.

<sup>23</sup> A tribute or tax paid in Spain to the king every seven years, in token or acknowledgment of sovereignty or vassalage. Vide *Cornejo Diccionario Real de España*, tom. 1. pal. "*moneda forera*."

<sup>24</sup> "And," according to the law cited (L. 9. tit. 1. lib. 5. Rec.; L. 3. tit. 5. lib. 10. Nov. Rec.) *Palacios* (2).

<sup>25</sup> Property acquired by industry or right of inheritance, independent of paternal fortune. By marriage, a son is emancipated from paternal power. Vide L. 3. tit. 5. lib. 10. Nov. Rec., referred to in the text.

## TITLE VII.

OF MARRIAGE PORTIONS (DOTES) JOINTURES (ARRAS), GIFTS OF HUSBANDS (DONADIOS DE ESPOSOS), AND GAINS DURING MARRIAGE, (GANANCIAS ENTRE MARIDO Y MUGER.)

CAP. 1. As we have explained in the preceding chapter what mutual promise of marriage is, as being necessary to the understanding what marriage is, in the same way it is necessary here to explain what is marriage portion (*dote*), jointure (*arras*), what donation of husband (*donadio de esposo*), and finally, what are gains (*ganancias*) between man and wife, because they are things which have their proper place, where they serve to complete the due understanding of matrimony.

*Dotes* and *arras* are given before and after<sup>1</sup> the celebration of matrimony, their ends or objects being, that those who marry may [ 48 ] have wherewithal to live and to support matrimony properly and faithfully, *Princip.* tit. 11. P. 4.

§ 1. *Dote* is the property which the wife gives to the husband on account of marriage, L. 1. tit. 11. P. 4. [L. 1. tit. 11. P. 4.] It is divided first into *profecticia* and *adventicia*. The latter (*adventicia*) is that which the wife herself gives, of what belongs to her, to her husband, or that which her mother gives for her, or any other of her relations, provided they be not those of the right descending or ascending line, but others,<sup>2</sup> as uncle, cousin, or other relation, or a stranger. *Profecticia* is the *dote* which the father or grandfather, or other of the ascendants<sup>3</sup> in the direct line give of their own property to the husband, L. 2. tit. 11. P. 4. [L. 2. tit. 11. P. 4.]

Hence it is in the first place, that if the father owes any thing to his daughter, and gives it as *dote* to the husband, although he pay it from his own property, it will be "*dote adventicia*," because he does not give it as a father, but as a stranger would, L. 2. tit. 11. P. 4. [L. 2. tit. 11. P. 4.] In the second place, for the same reason, that will be *dote adventicia* which is assigned by a stranger and given to the father, in order that he may deliver it to the daughter, L. 2. tit. 11. P. 4. [L. 2. tit. 11. P. 4.]

§ 2. *Dote* is divided in the second place into necessary and voluntary. The first is that which the father is obliged<sup>4</sup> to give to his daughter who is under his power. Voluntary is that which the wife

<sup>1</sup> But *vide* order in council, 16th September 1822, on this subject, Appendix K.

<sup>2</sup> Collaterals.

<sup>3</sup> In the right paternal line.

<sup>4</sup> That is, I apprehend, if she hath no property of her own for the purpose, and he hath the means of giving her a portion. See L. 8. tit. 11. P. 4. referred to in the text.

gives of her own accord, or any other person in her name, L. 8. tit. 11. P. 4. [L. 8. tit. 11. P. 4.]

§ 3. *Dote* may be established in many ways. 1st, By solemn promise, which is called in Latin *Stipulatio*; as, for instance, if a man should say to a woman with whom he would marry, "Do you promise to give me in *dote* such a vineyard belonging to you, or such an estate, or so many maravedis which such a man has to give you?" and she should answer "I promise." 2d, By mere or simple promise, or *pollicitatio*.<sup>5</sup> 3d, By promising to give it to the husband, or to any other in his name, for in this case it is the same as if the husband were to receive it, and he is bound to make it good if he accepted and approved the promise, L. 10. and 13. tit. 11. P. 4. [L. 10. and 13. tit. 11. P. 4.] 4th, *Dote* may be constituted purely, or absolutely and conditionally; and it is to be observed, that the condition, "*if the marriage be fulfilled*," although it may not be expressed, must be always understood. 5th, *Dote* may be given immediately, after being promised, or at a stipulated time [49] (*á plazo*). The former is called giving *dote* in hand or down (*dar la dote á mano*), and of this species is that which at the time or act of promising is delivered to the husband, or to some other in his name appointed or approved by him. Of this description also is the *dote* which the husband gives to the wife of a debt she owed him, saying to her, "Do you acknowledge or agree that you give me in *dote* so many maravedis, or such a thing that I was to have paid to you?" and she answers, "I acknowledge or agree and consider it as firm, and that I am paid as though I had received the money." The same holds if the husband were a debtor to another, and his creditor should assign as *dote* to the wife the debts due to him by the husband, L. 13. tit. 11. P. 4. [L. 13. tit. 11. P. 4.] To give *dote* at a stipulated or future time (*á plazo*) is to assign a day and time certain by which it is to be given. A day certain is, when the *dote* is promised on a day appointed; and time certain is, when it is promised to be given, for instance, within the year; and when promised in a time certain, as within the year, this must begin to run, or be counted from the day of the wedding,<sup>6</sup> L. 12. tit. 11. P. 4. [L. 12. tit. 11. P. 4.]

§ 4. The things which are assigned or given in *dote* are real<sup>7</sup> or personal (*raíces ó muebles*), L. 14. tit. 11. P. 4. [L. 14. tit. 11. P. 4.] *Dote* may also consist of a debt in favor of the wife, and in order that this species of *dote* may be valid, it is necessary that the debtor acknowledge the debt, and promise to pay it to the husband, L. 15. tit. 11. P. 4. [L. 15. tit. 11. P. 4.] These things are either valued, or

<sup>5</sup> A gratuitous promise, or *nudum pactum*, and here means a promise, accompanied with delivery of the *dote*, or gift. See L. 10. tit. 11. P. 4. referred to in the text.

<sup>6</sup> And not from the period of the promise. Vide law referred to in the text.

<sup>7</sup> It may be here added, that in the case of a female minor, she is not allowed to assign or deliver to husband, *dote*, in regard of real property, without judicial knowledge and consent, in addition to the authority or consent of her guardian; but she is permitted to do so, in respect of personal property, having only the consent of her guardian.



are not valued. *Dote* will be valued, when he who gives it says, "I give you such a thing in *dote*, and I value it at so many maravedis." It will be not valued when he only says, "I give you such an estate or property in *dote*." *Dote* that is valued possesses this privilege, that restitution or relief against injury suffered by error in its valuation may be obtained at all times, as well by him who gives, as by him who receives it, L. 16. tit. 11. P. 4. [L. 16. tit. 11. P. 4.]

§ 5. From all that has been said, the following axioms may be deduced, 1st, The father and grandfather are bound to portion (*dolar*) their daughter and grand-daughter according to their means. 2d, *Dote* is assigned in order the more easily to support the charge or burthen of matrimony. 3d, The husband is owner of the *dote* during marriage, L. 7. tit. 11. P. 4. [L. 7. tit. 11. P. 4.] 4th, On the dissolution of marriage it ought to return to the wife, or to whomsoever it may belong,<sup>9</sup> L. 7. tit. 11. P. 4. [L. 7. tit. 11. P. 4.]

[ 50 ] From the first axiom it results, 1st, That the father, when he marries his daughter, must portion her whether she have property of her own or not, L. 8. tit. 11. P. 4. [L. 8. tit. 11. P. 4.] 2d, That if the father do not, he may be compelled thereto by the judge of the place in which he may be, L. 9. tit. 11. P. 4. [L. 9. tit. 11. P. 4.] 3d, That the grandfather is not obliged to portion his grand-daughter, who is under his power or protection (*en su poder*), if she have property of her own for the purpose, L. 8. tit. 11. P. 4. [L. 8. tit. 11. P. 4.] 4th, That, under the like circumstances, the great-grandfather ought to portion his great grand-daughter under his power or care,<sup>9</sup> L. 8. tit. 11. P. 4. [L. 8. tit. 11. P. 4.] 5th, That the mother cannot be compelled to portion her daughter when the father has wherewith to do it,<sup>10</sup> but she is not deprived of the power of doing so voluntarily, L. 9. tit. 11. P. 4. [L. 9. tit. 11. P. 4.] 6th, If the mother is a heretic, Jewess, or Moor, she shall be compelled to portion her Christian

<sup>9</sup> This applies equally to *arras* or jointure, or *donatio propter nuptias*, which will go to the husband, or his heirs, on the dissolution of the marriage.

<sup>9</sup> *Palacios* here observes, that the father and grandfather are bound to portion their grand, or great grand-daughter, whom they shall have under their power, if she be poor, according to L. 8. tit. 11. p. 4. cited in the text; but that as, at present, the *patria potestad*, in respect to the grand and great-grand children, no longer exists in the grand and great-grandfather, by reason of their sons having withdrawn from the paternal power, in consequence of having married (L. 8. tit. 1. lib. 5. Rec. L. 3. tit. 5. lib. 10. Nov. Rec.), the obligation to portion them no longer exists; unless we adopt the opinion of those who hold that the fathers, and in default of them, the paternal grandfathers, are bound to portion their daughters or grand-daughters, although they may not be under their power, on the ground that this is more a natural than a civil obligation. The learned professor refers to *Covarrub. P. 2. de matrim. cap. 8. § 6. n. 15.*

<sup>10</sup> The law (9. tit. 11. P. 4.) referred to in the text, makes no such distinction; but states generally, that the mother cannot be compelled to portion her daughter. L. 4. tit. 3. lib. 10. Nov. Rec. which is L. 8. tit. 9. lib. 5. Rec. does say, that if the father alone shall, during marriage, give a portion, or make a donation, *propter nuptias*, to a common child of such marriage, such portion or donation shall be paid out of that particular species of property called *gananciales*, which will be explained hereafter, provided there shall exist such *gains*; but that if there be no such description of property of the marriage, then such portion or donation shall be paid out of the particular or exclusive property of the husband, and not of the wife. See the law here referred to.

daughter, L. 9. tit. 11. P. 4. [L. 9. tit. 11. P. 4.] 7th, The same obligation is imposed on the guardian, or person who may have under his power (*en su poder*) any woman; and he shall be compelled to portion her in proportion to her means, and the condition or rank of the person with whom she marries; in which case, if the guardian should give a greater portion of what the woman possesses, the excess will not be valid, L. 9. tit. 11. P. 4. [L. 9. tit. 11. P. 4.]

The excess (of *dote*, &c.) which was observed to be given on the marriage of daughters, rendered it necessary to establish, 1st, That he who may have from two hundred to five hundred thousand maravedis of *rent* or *income*, can only assign to each of his daughters a portion of a million of maravedis: he who may have less, only six hundred thousand: he whose income should exceed five hundred thousand up to one million and four hundred thousand maravedis, may only give a million and a half, and he who may have a rent or income of a million and a half maravedis or more may assign as a portion to each of his daughters one year's rent or income and not more; so that it cannot exceed two millions maravedis, L. 1. tit. 2. lib. 5. Rec. [L. 6. tit. 3. lib. 10. Nov. Rec.] 2d, This is so firmly established that Philip the 4th declared null the dispensations which the council might make or grant contrary to the tenor of this law, L. 5. tit. 2. lib. 5. Rec. [L. 7. tit. 3. lib. 10. Nov. Rec.] and its observance hath been repeated in the ordinance respecting the dresses of women, *de trages* de 1723, al cap. 24. and 25. 3d, That the ladies of honor cannot have more than a million of maravedis<sup>11</sup> *en dote*, L. 5. tit. 2. lib. 5. Rec. [L. 7. tit. 3. lib. 10. Nov. Rec.] 4th, That a third or fifth of one's property cannot be promised in dote, L. 1. tit. 2. lib. 5. Rec. [L. 6. tit. 3. lib. 10. Nov. Rec.]

From the second axiom it follows, 1st, That every thing may be given in *dote* which can be useful to the husband, Ll. 14. 15. 21. and 22. tit. 11. P. 4. [Ll. 14. 15. 21. and 22. tit. 11. P. 4.] 2d, and therefore the promise of dote to be given at the death of the husband will not be valid, L. 12. tit. 11. P. 4. [L. 12. tit. 11. P. 4.] 3d, But if any other except the wife promise the *dote* at a time uncertain, it will be valid, as the person promising it may happen to die during the [ 51 ] marriage, and the *dote* may be useful,<sup>12</sup> L. 12. tit. 11. P. 4. [L. 12. tit. 11. P. 4.] 4th, That *dote* must be proportioned to the riches of the wife, and the condition or rank of the husband, L. 9. tit. 11. P. 4. [L. 9. tit. 11. P. 4.]

From the third axiom it arises, 1st, That the husband acquires and gains the fruits or produce of *dote*, when once the marriage has taken place,<sup>13</sup> Ll. 18. and 25. tit. 11. P. 4. [Ll. 18. and 25. tit. 11. P. 4.]

<sup>11</sup> And a certain sum of money which the queen of Spain gives her maids when they marry (*y la saya*). Vide L. 7. tit. 3. lib. 10. Nov. Rec.

<sup>12</sup> i. e. to the husband. The example put in the law referred to in the text, is of a person promising *dote* to be paid at the time of the promiser's death; for his death may take place before that of the husband. This possibility makes the promised portion, or *dote*, valid.

<sup>13</sup> And possession of the *dote* hath been delivered to him. See L. 25. tit. 11. p. 4.

2d, That the decrease or increase of *dote valued*, caused *after* and not *before* the wedding, appertains to the husband, L. 18. tit. 11. P. 4. [L. 18. tit. 11. P. 4.] 3d, That the fruits or produce enjoyed before the wedding are considered an increase of *dote*, although equity directs that the husband who maintains and watches over the wife during the time that he is waiting, by reason of her imperfect age, to marry her, is not bound to consider or reckon as an increase of *dote* the *fruits* which he may have received before marriage, L. 28. tit. 11. P. 4. [L. 28. tit. 11. P. 4.] 4th, That the increase or decrease also of all the *dotal* property which has been counted, weighed, and measured, appertains to the husband, L. 21. tit. 11. P. 4. [L. 21. tit. 11. P. 4.] 5th, But of that not valued, which is received as equivalent in kind, as cattle, &c., the loss or the increase appertains to the wife;<sup>14</sup> although the husband is obliged to supply the number of those that may die from those that shall be born, Ll. 18. and 21. tit. 11. P. 4. [Ll. 18. and 21. tit. 11. P. 4.] 6th, That if the election be given to the husband of returning the *dote*, or its value, the injury or improvement shall be the wife's, if the husband shall elect to return the thing;<sup>15</sup> and the same if the election be left to the wife, L. 18. tit. 11. P. 4. [L. 18. tit. 11. P. 4.] 7th, That the increase of a quarry, not valued, is excepted, which appertains to the husband, L. 27. tit. 11. P. 4. [L. 27. tit. 11. P. 4.] 8th, That if *dotal* property, not valued, were lost by judgment at law, and the wife hath bound herself to warranty (*salio á eviccion*), she ought to be responsible for the loss; but if she gave it in good faith, without making herself responsible for it, the loss or injury will appertain to the husband;<sup>16</sup> and in regard to *dote* that is valued, the wife must give him another thing equal in value, L. 22. tit. 11. P. 4. [L. 22. tit. 11. P. 4.] 9th, That it is the

referred to in the text, which law qualifies, in regard to the produce or increase of slaves, the position laid down in the text. *Palacios* adds to the requisite already mentioned, that the marriage must have been celebrated, and that the husband must sustain the burthens of the marriage, as laid down in L. 25. tit. 11. P. 4. He observes, that this must be understood without prejudice to what will be afterwards said in this title, and with attention to Ll. 4. and 5. tit. 9. lib. 5. Rec. (Ll. 3. and 5. tit. 4. lib. 10. Nov. Rec.), which enact, that the fruits (*frutos*) received during marriage, whether arising from property belonging to the husband, or to the wife, are divided, or appertain, in equal portions, to both.

<sup>14</sup> The law (L. 21. tit. 11. P. 4.) referred to in the text, says, that the husband shall enjoy the fruits or increase of the cattle, subject to the condition of supplying the numbers which may die, from those which may be born. *Palacios*, on this part of the text, observes, that the increase or decrease, improvement or deterioration of *dotal* property appertains to the husband when it has been delivered to him valued, or when it is delivered in any of those things which consist in weight, number, or measure; and that the same appertains to the wife, when such property hath not been delivered to the husband valued, or under appraisement. The learned professor adds the substance of what is stated in the first part of this note.

<sup>15</sup> *Ex. gr.* a house. Unless, says *Palacios*, referring to L. 18. tit. 11. P. 4. it should be proved that the loss had arisen by the fault of the husband.

<sup>16</sup> The loss or risk, according to L. 22. tit. 11. P. 4., would belong to the wife; because, although she may not be bound, in this case, to the warranty of the *dote*, the injury which she suffers in its loss, is greater than that which the husband suffers; and what is more, without this explanation, it would, perhaps, be supposed, that the husband was bound to the warranty (*saneamiento*) of the *dote*; *Palacios* (5).

duty of the husband to recover the *dote*,<sup>17</sup> L. 15. tit. 11. P. 4. [L. 15. tit. 11. P. 4.] 10th, Except that it be a debt due by the wife's father, grandfather, or great grandfather;<sup>18</sup> in which case the husband is not responsible for the risk which might ensue, if any of them should arrive at a state of poverty, on account of his not being able to enforce the recovery of it from them,<sup>19</sup> L. 15. tit. 11. P. 4. [L. 15. tit. 11. P. 4.] 11th, But if it were the debt of a stranger, and the [ 52 ] husband were able to compel the payment of it in time, he will be responsible, although the stranger should be reduced to poverty; and the wife shall be entitled to her action against the husband for it, if he should not recover it, L. 15. tit. 11. P. 4. [L. 15. tit. 11. P. 4.] 12th, This is understood if the debt due by the stranger were an onerous debt (*de apremia*); because, if it arose from mere voluntary obligation; as, for instance, if any one should have promised the wife to give her any certain thing, and the husband neglected to ask for it at a time when the stranger was able to pay it, then the prejudice or injury shall belong to the husband; and if it is a thing not certain or specific, the husband is not obliged to recover it; and, consequently, is not responsible for the damage which may result, L. 15. tit. 11. P. 4. *ad fin.* [L. 15. tit. 11. P. 4. *ad fin.*]

From the fourth axiom it follows, 1st, That the husband cannot alienate, sell,<sup>20</sup> nor mispend the *dote*, L. 7. tit. 11. P. 4. [L. 7. tit. 11. P. 4.] 2d, But if he should, and the wife fear that he may be reduced to poverty, she will have a right to require security from him, and an allowance of aliment,<sup>21</sup> L. 29. tit. 11. P. 4. [L. 29. tit. 11. P. 4.]

§ 6. The restitution of *dote* takes place in three cases. 1st, By the death of the wife. 2d, By reason of the existence of an impediment, which may dissolve the marriage. 3d, By divorce. In the first case, if the wife dies without children, the *dote* called *profecticia*

<sup>17</sup> That is, *dote* which consists of the assignment of a debt that was due to the wife. See L. 15. tit. 11. P. 4. quoted in the text.

<sup>18</sup> *Palacios* states, that in this case, also, it is competent to the husband to recover the *dote*, although it is true, that if he does not recover it, he is not responsible, for the reason assigned by the text. He refers to L. 15. tit. 11. P.

<sup>19</sup> On account of the relationship of such persons.

<sup>20</sup> He can dispose of *dote* in money, &c., but the amount must be returned out of his property, after the dissolution of the marriage. See L. 7. tit. 11. Part 4.; and also L. 21. *ibid.* *Palacios* has a note (I) here to the above effect. He says, that when the *dote* is comprised of things consisting of weight, number, or measure, and when it is valued under an appraisement which produces sale or transfer, the husband may alienate it; for in such cases, an irrevocable dominion in the *dote* is transferred to him, with the obligation of restoring its value, or the quantity, if they are things which consist of weight, number, or measure, after the dissolution of the marriage. He refers to Ll. 7-18. and 21. tit. 11. P. 4.

<sup>21</sup> This Law (29. tit. 11. P. 4.) goes further, and says, that if the husband badly administers the *dotal* property, or be a gamester, &c., and the wife fears he will dissipate it, she may judicially require that he be compelled to deliver it up to her, or to give security that he will not dispose of it; or to deliver it into the possession of a third person, to take care of, and to apply the profits to their support or maintenance; but it seems she cannot demand the *dote*, being thus taken out of the possession of her husband, if his poverty or distress were occasioned by mere misfortune, and not by culpability or improper conduct. See the law referred to.

is restored to the father; and if it is *dote* called *adventicia*, to the heirs of the wife; observing, in this case, the covenants of the deed of *dote*, or marriage articles, (*escritura de dote*,) L. 30. tit. 11. P. 4.; [L. 30. tit. 11. P. 4.;] but if she leaves children, the husband<sup>22</sup> remains in the enjoyment of the usufruct, and the dominion (*la propiedad*) passes to them. If the wife dies without making a testament, and without father or relation who may inherit from her, the *dote* escheats to the crown, (*a la real camara*,) L. 12. tit. 8. lib. 5. Rec. [L. 1. tit. 22. lib. 10. Nov. Rec.,] which annuls or alters<sup>23</sup> L. 23. tit. 11. P. 4. [L. 23. tit. 11. P. 4.] In the second case, if the *dote* is "*profecticia*," it is delivered to the father;<sup>24</sup> and if "*adventicia*," to both;<sup>25</sup> and if the father be dead, to the daughter, whether she has children or not, L. 30. tit. 11. P. 4. [L. 30. tit. 11. P. 4.] In the third case, if the *dote* is *adventicia*, it is given to the daughter, and not to her father, although he may be living, L. 30. tit. 11. P. 4. [L. 30. tit. 11. P. 4.]

*Dote* consisting of real property is restored immediately on the dissolution of marriage; and if it consists of personal property (*meubles*) restitution shall be made of it within a year, unless there be minor children,<sup>26</sup> when the surviving consort is not obliged to deliver up the *dote* until the children arrive at the age of majority; but he or she shall be bound to maintain and educate them, and not to alienate nor mispend the *dote*, L. 31. tit. 11. P. 4. [L. 31. tit. 11. P. 4.]

[ 53 ] At the time of this restitution, the husband may require to be reimbursed the expenses which he has laid out on the *dotal* property which have proved beneficial; but not those which shall serve

<sup>22</sup> Or the wife, as to *donatio propter nuptias* and *arras*, if she is the survivor. See L. 23. tit. 11. P. 4. *Palacios* observes in respect to this enjoyment by the husband of the usufruct of *dotal* property after the death of the wife, leaving issue, or this species of tenancy by the *curtesy*, that it only lasts while the children are under the paternal power, L. 5. tit. 17. P. 4.: for that by going, or being absolved, from it, they acquire the property and the usufruct of *adventitious* property, L. 9. tit. 1. lib. 5. Rec. [L. 3. tit. 5. lib. 10. Nov. Rec.] *Greg. Lopez* gl. 6. L. 15. tit. 18. P. 4.; but that if the release be by emancipation, the father may retain the half of the usufruct, L. 15. tit. 18. P. 4.

<sup>23</sup> Only in this last respect, L. 23. tit. 11. P. 4., having in the case of husband or wife dying intestate, and without heirs, given the survivor of them the *dotal*, &c., property of the other. *Palacios* says, some authors are of opinion that L. 12. tit. 8. lib. 5. Rec., [L. 1. tit. 22. lib. 10. Nov. Rec.] does not repeal or alter L. 23. tit. 11. P. 4., and that, therefore, in default of relations, the wife and the husband ought to inherit from each other according to the survivorship respectively. The learned Professor adds, that he dares not go this length, but he will remark, that L. 23. tit. 11. P. 4., directly, positively, and expressly calls the surviving consort to the inheritance of the property of the one deceased, in default of heirs or relations; and that neither L. 12. tit. 8. lib. 5. Rec., nor the royal order (Reglamento) of 1788, in regard to escheats, excludes husband and wife from this benefit of reciprocal inheritance. Among those authors who entertain the foregoing opinion, the learned Professor might have mentioned the respectable authority of Azevedo. *Vide* his Com. on the Law of the Rec. under consideration.

<sup>24</sup> i. e. to the father of the wife.

<sup>25</sup> i. e. to the wife and to her father. *Palacios* says, if *adventitious*, it is delivered to the daughter alone; if *profectitious*, to the father and daughter jointly. He refers to L. 30. tit. 11. P. 4.

<sup>26</sup> Of the marriage.

for mere ornament, L. 32. tit. 11. P. 4. [L. 32. tit. 11. P. 4.] which is understood to regard *dote not valued*; for with respect to that which is valued, restitution is made by the return of its value, L. 26. tit. 11. P. 4. [L. 26. tit. 11. P. 4.] And if the *dote* was of things numbered, weighed, and measured, the same quantity ought to be returned, L. 25. tit. 11. P. 4. [L. 25. tit. 11. P. 4.]

In this restitution is also discounted, in favor of the husband, the part of the<sup>27</sup> fruits or produce collected, or to be gathered of the *dotal* property on the last year of the dissolution of marriage in proportion to the months and days that it continued, L. 26. tit. 11. P. 4. [L. 26. tit. 11. P. 4.] and never shall the husband or his heirs be compelled to restore this *dote*, but in as far as they are able, and they shall not be deprived of aliment thereby;<sup>28</sup> although the judge ought to secure its restitution at stipulated periods of payment, or by some other way, L. 32. tit. 11. P. 4. [L. 32. tit. 11. P. 4.] But in no case shall the action to recover the *dote* be extinguished or destroyed, although the capital of it be lost and<sup>29</sup> the property and estate of the husband, as observed by *Ayora de Partitionibus*, part 1. cap. 7. n. 5.

The husband is not bound to restore the *dote* if he shall gain it by any of those three modes, viz.:—by covenant or compact,<sup>30</sup> by adultery, or by custom of the place where the marriage took place, L. 23. tit. 11. P. 4. [L. 23. tit. 11. P. 4.]; and this custom shall be of such force and effect, that although the married couple may go to live in another country where it does not prevail, it shall be, nevertheless, observed. This is understood, provided there be no children,<sup>31</sup> L. 24. tit. 11. P. 4. [L. 24. tit. 11. P. 4.].

Cap. 2. The woman is accustomed to bring, beside her portion (*dote*) other property which is called *paraphernalia*,<sup>32</sup> and which is or are,

<sup>27</sup> *Emblements*.

<sup>28</sup> This, observes *Palacios*, is not understood in respect to all the heirs of the husband, but only in regard to the children when they have to deliver the *dote* to their mother on account of their father. He refers to L. 32. tit. 11. P. 4.

<sup>29</sup> This conjunction is introduced to make the sense complete, although it is not found in the text.

<sup>30</sup> This covenant must be reciprocal as to its effects on husband and wife, with respect to *dote* and *arras*, or donation of the husband.

<sup>31</sup> And L. 23. tit. 11. P. 4. *Palacios* adds, that if there be children of the marriage, they, in the cases mentioned in the text, will have the property; and the father or the mother, who shall survive, &c., will have the usufruct of it for life.

<sup>32</sup> The meaning attached to this word, which is of Greek origin, *παρά* præter, and *φερα*, doc. i. e. all things which a woman brings to her husband besides her dowry or portion, by English law is much more limited. See the observation on this word, as regards the laws of England, in *Wood's Inst. Civ. Law*. b. 1. ch. 2. p. 123., fol. edit. 1730. The Translator from the fear of making his notes too extended, has refrained from more frequent quotations from the learned Civilian in the progress of this translation: he here begs to make a general reference to this excellent elementary work on the civil law, and, without presuming to pronounce a judgment on the comparative merits of the several learned works of this kind, he may venture to state, that the English student of the laws of Spain, will find his course of study of those laws, at least of those which form the compilation called *Las siete Partidas*, facilitated by a previous attentive perusal of *Wood's Institutes of the Civil Law*. *The Analysis of the Roman Civil Law*, by Dr. Halifuz, and a *Compendious View of the Civil Law*, by Dr. Broune, may be also read with advantage.

the property and things whether personal (*muebles*) or real (*raices*) which wives retain for their separate use, and which are not accounted part of the portion or *dote*, L. 17. tit. 11. P. 4. [L. 17. tit. 11. P. 4.] From this definition it follows, 1st, That if the wife gives to the husband this property, with the intention that he may have the dominion (*señorio*) of it, he shall possess it during marriage; and if she should not do this expressly in writing,<sup>33</sup> the dominion of such property will be always in the wife, L. 17. tit. 11. P. 4. [L. 17. tit. [ 54 ] 11. P. 4.] 2d, That if this property should be sold with the approbation of the wife, its price or value shall not be deducted at the time of separation; but otherwise when it hath been converted to the particular benefit of the husband, although the wife should consent, unless the husband be so poor, that it be necessary to sell it to maintain himself. *Ayora*, part. 1. cap. 8. nn. 2, 3, and 4. 3d, That if it be sold without the assent of the wife, she will have her action or remedy against the purchaser, and if not, she shall take the value from the fund of property (*cuerpo de los bienes*) before partition be made. *Ayora*, part. 1. cap. 8. n. 5. 4th, That the property of the husband is always bound or liable for the prejudices and injury which he shall cause to the *paraphernalia*<sup>34</sup> of the wife, L. 17. tit. 11. P. 4. [L. 17. tit. 11. P. 4.]

Cap. 3. By jointure<sup>35</sup> (*arras*) is understood the donation which the

<sup>33</sup> *Palacios* observes, that L. 17. tit. 11. P. 4. (cited in the text), does not say, that a written instrument is necessary to transfer the dominion, or fee simple, of property called *paraphernalia*, during marriage. That in whatever way, therefore, it duly appears the gift was made by the wife, with this intention, the transfer would be complete; and that this is what is inferred from the law cited.

<sup>34</sup> Equally with respect to *dote*; *bienes parafernales* being entitled to the same privilege as *dote*: and the tacit obligation or lien which the law gives the wife on the property of her husband, for her *dote* and *parafernales*, attached the moment of their receipt by the husband. See L. 17. tit. 11. P. 4.

<sup>35</sup> This word seems more nearly to express the meaning of *arras*, than any other that can be substituted. *Lord Coke*, 1st Inst. 36, defines jointure, "a competent livelihood of freehold, for the wife, of lands and tenements, to take effect in profit and possession, presently after the death of the husband, for the life of the wife at least." *Arras*, may be defined, "a dowry assigned to or settled upon a wife, by her husband, for her maintenance after his death, which cannot exceed, in value or amount, the tenth part of his fortune or property. Jointure before marriage, in England, is in lieu and conclusion of dower at common law; and *arras*, excepting in so far as its promise or settlement seems optional or voluntary with the husband, more resembles the English dower than any other description of right appertaining to the wife, in regard of the property of her husband, under the laws of Spain; even more so than does her right in regard of that species of property called *ganancial*, which will be explained, in course, in the text; to one-half of which last mentioned property, subject to the payment of one moiety of the debts contracted during marriage by the husband and wife, the wife is entitled, independently, however, of her *arras*, at the death of the husband, if she survives him: the *ganancial* property may, nevertheless, be disposed of by sale, or other onerous transfer, by the husband, during marriage, without the consent of the wife; except, indeed, it be done *con malicia y en fraude* of her *ganancial* rights. Such rights, it is to be observed, only attach on property acquired by husband and wife during marriage, by purchase, in the vulgar acceptance of the word, or by other onerous title; but not on property brought into marriage by either party, nor on that acquired, by either consort, by inheritance or succession, devise or gift. On reference to the laws of the 11th Title, 4th Partida (Ll. 1-7-23, &c.), which treat of the subject, the reader would suppose, that *donatio propter*

husband makes to the wife, by reason or on account of marriage, L. 1. tit. 11. P. 4. [L. 1. tit. 11. P. 4.] and also in consideration of the

*nuptias* and *arras*, implied one and the same thing; and that the amount of *dote* brought by the wife into marriage, was, of necessity, met by a corresponding assignment to her of property on the part of her husband, in recompense of, and as a security for, the *dote* of the wife; he having the usufruct of both, but without power of alienation of either, during marriage, for the support of the marriage, or the maintenance of both consorts, and the children of the marriage; such donation to revert to the husband, or to go to his heirs according to the rules of succession, in the same way as the *dote* was to revert to the wife, or to go to her heirs, according to the like rules of succession, after the dissolution of marriage. This supposition is, however, removed on reference to the laws of the *Fuero Real*, and of the *Recopilacion*, or the *Novissima Recopilacion* of the Laws of Castille, and to able commentators on the laws of Spain. It is matter, it must be confessed, of laborious concern to the student, or practical professor of these laws, whose anxiety for the best illustration of his subject, is apt to induce a reference to these very learned and ingenious commentators, to find the great number, or vast variety of their elaborate works, often equalled by the diversity of conflicting opinions they offer with respect to the same points; which, if they do not perplex and mislead, just leave the inquirer, after a laborious research, where he was before he looked into them. The learned *Antonio Gomez*, in his annotations on Ll. 50, 51, 52 and 53, *Tauri*, speaking of these matrimonial donations, *arras*, &c. says, n. 1. "in jure nostro diversis modis fit mentio de his quæ dantur ab uno conjugum alteri, inter quæ est maxima diversitas et difficultas," &c.: he divides these gifts into six sorts: "1. Donatio quæ vocatur *sponsalitia largitas*. 2. Donatio quæ vocatur *propter nuptias vel ante nuptias*. 3. Donatio quæ vocatur *arras*. 4. Donatio quæ vocatur *dos*. 5. Donatio pura et simplex quæ vocatur *donatio* inter virum et uxorem. 6. Donatio reciproca ab ipsa lege, mediæ tatis lucrorum acquiritorum constante matrimonio." With respect to the second sort, *donatio propter*, or *ante nuptias*, he says, n. 9.: "Et certe materia hujus donationis est satis dubia et incognita, et vix potest ejus virtus et effectus intelligi: et in ea aliquantulum insudavi, &c." It is to be regretted, that the modern laws of the *Rec.* or *Nov. Rec.* have not more clearly solved or removed the difficulty. The 3d Title of the 10th Book of the *Nov. Rec.* embraces *Arras dotes y donaciones propter nuptias*: but does not seem to contain any laws strictly applicable to donation *propter nuptias*, let alone to point out any difference between it and *arras*. Law 4th of the title cited, does certainly make a regulation as to the property of husband and wife, out of which shall be paid the *dote*, and *donatio propter nuptias*, assigned by them to daughters and sons of the marriage; but there is no statutory provision, that I have been able to discover, which marks, or points out, the separation or difference between the two descriptions of gifts, called *donaciones propter nuptias*, and *arras*: they were confounded or described as one and the same thing, as has been before mentioned, by the laws of the 11th Title of the 4th Partida. The laws of the *Fuero Juzgo* would seem to confound them also; the 4th law, art. *Donac.* of which says; the property which the husband promised to the wife in *arras*, shall go, after her death, to the sons or children (of the marriage); and if there should be none, to the heirs of the husband. L. 1. tit. 2. Book 3, of the *Fuero Real*, limits the amount to be given by the husband to the wife, in *arras*, to the tenth part of his property; and seems, for the first time, to deprive the husband of his dominion in and to *arras*, by extending to the wife both an alienable (if the word may be allowed) and a testamentary disposition, over it, to his prejudice; although it directs such property or *arras*, to revert to the husband, or to go to his heirs, in case the wife should die intestate, without children of the marriage: but this may be called an alteration in the law, without any distinction, as between *arra*, and *donatio propter nuptias*. The 5th law of the same Title and Book of the *Fuero Real*, gives the woman, espoused with respect to *arras*, "6 *donacion*," (to use its own words,) an advantage over the man affianced, in case of death, before consummation of the marriage: and lastly, L. 2. tit. 3. lib. 10. *Nov. Rec.*, completely divests the husband of all right of property, or dominion, in or to the *arras*, which he himself hath promised or given to the wife; he still being allowed to enjoy the usufruct of it, in common with that of *dote*: but even here the reader sees no declaration, nor specification, as to any separation or difference of meaning having taken place between donations, *propter nuptias*, and those formerly expressed by the synonymous term *arras*. The difference between them is noticed by the able commentator *Gregorio Lopez*, on the Laws of the *Partidas*, Gl. 4. L. 1; Gl. 6. L. 7; Gl. 2. L. 23. tit. 11. Part. 4; and



*dote* which he receives, L. 2. tit. 11. P. 4. [L. 2. tit. 11. P. 4.] Hence it follows, 1st, That as the *dote* may be given before or after<sup>36</sup> marriage so may also *arras*, L. 1. tit. 11. P. 4. [L. 1. tit. 11. P. 4.] 2d, That the express covenant<sup>36</sup> in the deed of *dote* or marriage articles is understood, also with respect to *arras*, L. 23. tit. 11. P. 4. [L. 23. tit. 11. P. 4.] 3d, That in order to prevent an excess in the assignment of *arras*, the husband is prohibited from giving more than a tenth of his property, L. 1. tit. 2 lib. 3. *Fuero Real*; so that if more be given, it will not be valid, and the relations may demand or sue for the surplus, L. 1. tit. 2. lib. 3. *Fuero Real*. 4th, That this law cannot be renounced, L. 2. tit. 2. lib. 5. Rec. [L. 1. tit. 3. lib. 10. Nov. Rec.] 5th, That if *arras* be promised from the present and future property of the husband, the gift of *arras*, or the settlement will be valid although it may not comprise the tenth of the present property, if at the time of the separation or dissolution of marriage, *ganancial* property, or property that was inherited is found which may suffice to authorise the said tenth, L. 2. tit. 2 lib. 3. *Fuero Real*; *Ayora*, Part 1. Cap. 7. n. 18. 6th, That if the husband promises *arras* out of property he has in possession, which should afterwards turn out not to be all his, but which was possessed by him with good faith, he shall only be obliged to pay the tenth of the property which may be really his, *Ayora*, Part 1. Cap. 7. n. 23. 7th, That if the husband

Gl. 2. L. 87. tit. 18. P. 3: who, however, says, that *arras* have succeeded in the place of donations *propter nuptias*, and that the latter was now called in Spain *arras*. It has been before stated, in this note, that *donatio propter nuptias*, and *arra*, are synonymously used in the Laws of the 11th Title of the 4th Partida. Law 87. tit. 18. Part 3, gives the form of an instrument of settlement of *arra e donacion*, from husband to wife. The settlement is upon the wife, and the children of the marriage; but no provision is made in regard of the property, in the event of there being no such children at the death of the wife. The 86th law of the same title and partida, gives the form of an instrument of *dote*, which is confirmable with the rules respecting *dote*, laid down in the laws of the 11th title of the 4th Partida. But the form of the instrument respecting *arra*, in L. 87. before mentioned, seems silently to depart from the rules of reciprocity or equality between *dote* and *arra*, or *donatio propter nuptias*, as before recognised in the laws of the 11th title of the 4th Partida. The difference between *donatio propter nuptias* and *arra*, is also noticed by Antonio Gomez, in his Commentary on Ll 50, 51, 52, and 53. *Tauri*, before mentioned, n. 9, 10, 11, 12, 13, 14., and see also n. 15, 16. *ibid.*; and also by the learned Azepedo on Ll. 2, 3, and 4., tit. 2 lib. 5., *Recopilacion*; and likewise by the not less learned Covarrubius, in his most able work, Tom. 1. Pars 2. *De Matrimonio*, cap. 3. § 7. p. 188, n. 14, and 15.; and it is stated by the three last authors, that the gift called *donatio propter nuptias*, is in disuse, or obsolete in Spain. This note has been extended much beyond its desired length, and the Translator must beg to refer the reader, who is disposed further to investigate the subject, to the learned authors whom he has consulted and cited.

<sup>36</sup> I should apprehend, from the now existing difference between *arra* and *donatio propter nuptias*, that the promise or settlement of *arra*, to be valid, must be made before marriage, although it may take effect on property (not exceeding the tenth of its value, at the time demanded by the wife) to be acquired after marriage. Vide *Gr. Lopez*. Gl. 4. L. 1. tit. 11. p. 4. and L. 2. tit. 2. lib. 3. *Fuero Real*. *Ayora*, P. 1. chap. 7. n. 18. quoted in the text. Since this note was written an order in council, 16th September 1822, bearing on the subject has been passed: vide Appendix, K.

<sup>36</sup> Relative to the survivor taking the property after the death of the other, which the law only permits in the absence of necessary heirs of the party deceased. The term, necessary heirs, will be in due course explained. Vide p. 109 of the text, tit. 3. § 2. post.

is imposed upon (*padece engaño*) with respect to the *dote*, he may repair the fraud and indemnify himself for it out of the *arras*,<sup>27</sup> *Ayora*, Part 1. Cap. 7. n. 34. 8th, That the wife dying without children, may dispose of the *arras* as she pleases,<sup>28</sup> L. 1. tit. [ 55 ] 2. lib. 3. *Fuero Real*. 9th, That the wife has a right to exact the *arras* only promised, L. 1. tit. 2. lib. 3. *Fuero Real*. 10th, That if the wife dies leaving children by the husband, she may dispose of one-fourth of the *arras*, and the remaining three-fourths shall go to the children,<sup>29</sup> L. 1. tit. 2. lib. 3. *Fuero Real*. 11th, But that if she dies without children, and making any express disposition of her *arras*, such property shall pass to her heirs, L. 3. tit. 2. lib. 5. Rec. [L 2. tit. 3. lib. 10. Nov. Rec.] 12th, That if the husband dies leaving children, the wife shall have the usufruct of the *arras*, and the children the dominion or property (*propriedad*) if she marries a second time, *Ayora*, Part 1. Cap. 7. n. 21. 13th, That the *arras* is considered the particular or exclusive property of the wife; and therefore if the marriage is dissolved, and the *arras* hath been expended during it, the amount or value shall be deducted or taken out of the general fund (*cuerpo de los bienes*); but, if it hath been promised at the period of separation by the consorts, it shall then be taken out of the particular property of the husband; because it would be an injury to the wife to take it out of the *ganancial* property, of which she is entitled to a share, unless she should renounce *gananciales*, *Ayora*, Part 1. Cap. 7. n. 16. 14th, That the husband cannot alienate the *arras*, although the wife consent to it, by reason of the right of restitution, L. 4. tit. 2. lib. 3. *Fuero Real*. 15th, That if the husband had connection with the wife, after the marriage was dissolved, the *arras* shall be hers, but if not, it shall return to the husband or to his heirs, L. 5. tit. 2. lib. 3. *Fuero Real*. 16th, That the wife forfeits *arras* by adultery, or if she quits or elopes from her husband's house (*se va de casa*) of her own accord,<sup>30</sup> L. 6. tit. 2. lib. 3. *Fuero Real*.

<sup>27</sup> That is, I presume, may reduce the property which he had assigned for *arras* to the wife, in so much or to the amount of the imposition practised on him in regard of the value of the *dote*.

<sup>28</sup> Provided she have no ascending heirs (*ascendientes*); for if she should, all the property, of whatever nature it may be, of the wife, belongs to her ascending heirs, without her being able to dispose of more than one-third part, L. 1. tit. 8. lib. 5. Rec. [L. 1. tit. 20. lib. 10. Nov. Rec.] *Palacios* (1).

<sup>29</sup> She may, observes *Palacios*, according to the law of the *Fuero Real* cited, dispose of one-fourth part for the benefit of her soul (*por su alma*); but it should be remembered, that by L. 12 tit. 6. lib. 5. Rec., L. 8. tit. 20. lib. 10. Nov. Rec., all the property of the parents belongs of right (*legitima*) to their children, with the exception of one-fifth (*el quinto*), of which the parents may freely dispose.

<sup>30</sup> The wife, says *Palacios*, forfeits the *arras*, if she commits adultery, provided it be proved, and the husband desires it. And if she should go from her house to commit it, she forfeits the *arras*, although it is not proved that she effected her purpose, by reason of some obstacle; that this is what is stated by L. 6. tit. 2. lib. 3., *Fuero Real*. The learned professor adds, that it will be understood, the wife went from her house for the purpose of committing adultery, when, against her husband's will, she visits suspected houses.

Cap. 4. A marriage gift (*donadio*)<sup>41</sup> is the gift which the suitor makes to the spouse, or she to him freely, without condition, before the marriage be completed by words of the present, L. 3. tit. 11. P. 4. [L. 3. tit. 11. P. 4.]

Thus as means have been adopted by our laws to restrain the excess of *dotes* and *arras*, in the same manner the excess of these gratuitous gifts has been moderated; wherefore, it is established 1st, That the suitor or husband cannot give to his spouse by way of gift in clothes, jewels, &c., more than shall amount to the eighth part of her *dote*, L. 1. tit. 2. lib. 3. Rec. [L. 6. tit. 3. lib. 10. Nov. Rec.] 2d, That if the jewels exceed this eighth part, the wife shall not have as her own more of them than may amount to that value, L. 1. tit. 2. lib. 5. Rec.; [L. 6. tit. 3. lib. 10. Nov. Rec.] which is ordered to be [ 56 ] observed by the before mentioned royal ordinance (*pragmatica real*) of 1723.

This gift, in respect of its effect, has certain limitations. 1st, If it should happen that by the fault of one of the betrothed parties the marriage do not take place, the party in fault must return to the other the gift received, L. 3. tit. 11. P. 4. [L. 3. tit. 11. P. 4.] 2d, But if this should happen by the death of one of the couple, a distinction must be made in observing, that if the man dies before kissing the woman, the gift ought to return to the heirs of the deceased suitor; but if he should have kissed her, she will gain the half; and if this gift should have been made to the man by the woman, and she should die before marriage, whether they have kissed or not, the jewels and other things devolve to the heirs of the woman, L. 3. tit. 11. P. 4. [L. 3. tit. 11. P. 4.] See also L. 4. tit. 2. lib. Rec. [L. 3. tit. 3. lib. 10. Nov. Rec.] 3d, If there be only a gift, and no *arras*, it shall be the woman's, and be restored to her or her heirs upon the separation of marriage, under the same laws we have mentioned with respect to *arras*; and if there be both, she or her heirs may elect to take either of them they should prefer, and this election is to be made within the term of twenty days,<sup>42</sup> L. 4. tit. 2. lib. 5. Rec. [L. 3. tit. 3. lib. 10. Nov. Rec.]

Cap. 5. The right to *ganancias*<sup>43</sup> is founded on the partnership or

<sup>41</sup> Or *Sponsalitia largitas*.

<sup>42</sup> And if the woman or her heirs should refuse or fail to elect within this term, then the heirs of the man may elect which of the two he or they shall take: this is provided by L. 3. tit. 3. lib. 10. Nov. Rec. referred to in the text.

<sup>43</sup> The establishment of the right of *ganancias* would seem to be one of the few institutions for the suggestion of which Spain is not indebted to Roman jurisprudence, although this declaration is not supported by the unanimous assent of writers; for by some it is stated that, amongst the ancient Romans, so far back as the time of Romulus and Numa Pompilius, all property acquired during marriage was common or *ganancial*: but be this as it may, no mention as far as the research of the translator enables him to speak (and it is believed his assertion will be found correct) is made of *gananciales*, as between husband and wife, in the laws of the *Partidas*. It would appear that custom gave rise to the establishment, in Spain, of this right, and that the first recognition with which it was honored by the *lex scripta*, was the notice taken of it by L. 17. tit. 2. lib. 4. *Del Fuero Juzgo*; and the rule was adopted and extended by the *Fuero Viejo*, *Fuero Real*, *Ordena-*

society which is supposed to exist between the husband and wife, because she bringing her fortune (*capitales*) in *dote*, gift, and *paraphernalia*, and he his in the estates and property which he possesses, it is directed that the gains (*ganancias*) which result from the joint employment of this mass of property or capital, be equally divided between both partners. Hence we might have found a reason for treating of *ganancias* between husband and wife, when we should treat of the contract of partnership; because, in this sense, *Ayora* and others explain it; but it has appeared more proper to us to treat of this matter in this place, both because it must derive much light from what we have just said respecting *dote*, *arras*, &c.; and also because it will contribute to form a perfect idea of marriage, which, as we have allowed, we only consider here in its light of a contract.

§ 1. *Ganancial* property (*bienes de ganancias*) is all that which is increased or multiplied during marriage, L. 10. tit. 9. lib. 5. Rec. [L. 10. tit. 4. lib. 10. Nov. Rec.] By multiplied, is understood all that is increased by *onerous* cause or title, and not that which is acquired by a lucrative one, as inheritance, donation,<sup>44</sup> &c. L. 12. tit. 3. [ 57 ] lib. 3. *Fuero Real*. And property is supposed to be common, except that which each shall prove to be their own separate property,<sup>45</sup> L. 1. tit. 9. lib. 5. Rec. [L. 4. tit. 4. lib. 10. Nov. Rec.]

§ 2. From all which it is inferred, 1st, That what the husband or wife bring into marriage as their own peculiar property, or acquire during it by lucrative cause or title, does not come into partition. 2d, But that the property acquired during marriage by purchase, sale, or other onerous cause or title, does. 3d, That immediately upon a division being made of this *ganancial* property, each acquires an absolute dominion as to their respective moieties or proportions. 4th, That as the gains (*ganancias*) are common, so also are the injuries or damage which shall happen to them, unless they arise by the fault of only one of the partners.

From the first principle it is inferred, 1st, That *dote*, *arras*, marriage gift (*donadio de esposo*) and *paraphernalia* are not *ganancial* property, or property subject to partition or division. 2d, Nor the inheritance from the father, nor the gift of a stranger to one of the consorts, L. 2. tit. 3. lib. 3. *Fuero Real*. Ll. 2. and 3. tit. 9. lib. 5. Rec.<sup>46</sup> [Ll. 1. and 2. tit. 4. lib. 10. Nov. Rec.] 3d, Nor the gift made

*miento Real*, and the *Recopilacion*, and will be found explained in the text. See the *Teatro de la Legislacion Universal de España é Indias*, 5th vol. tit. *Bienes Gananciales*.

<sup>44</sup> *Palacios* observes, that all the property which husband and wife acquire during marriage, and while they live together, by a common title, whether onerous or lucrative, will be common; and that which each acquires, particularly by a lucrative title, as by gift, or by testament, or *ab intestato*, will be the property, exclusively, of the consort who so acquires it. He refers to L. 1. tit. 3. lib. 3., *Fuero Real*; Ll. 1-2. and 3. tit. 9. lib. 5. Rec. [Ll. 4. 1. and 2. tit. 4. lib. 10. Nov. Rec.]

<sup>45</sup> All property of husband and wife is presumed common or *ganancial*, until it be proved to be the separate property of either. See L. 4. tit. 4. lib. 10. Nov. Rec.

<sup>46</sup> And prize-money obtained in war by the husband is not *ganancial*, unless his outfit,

by the relations (*parientes*) of the wife to the husband; or *vice versa*, because it is always accounted the fortune or property (*capital*) of the person to whom it is made, *Ayora*, P. 1. Cap. 8. n. 18. and 19. 4th, Nor the usufruct which the father enjoys of the property of his child; and, wherefore, all these sums or descriptions of property (*capitales*) ought to be separated at the time of the dissolution of marriage, from the total mass, before making a division of property, *Ayora*, P. 1. Cap. 7. n. 1. ad. 15. and Cap. 8. n. 19. 20. and 21.

From the second principle it is deduced, 1st; That the fruits (*frutos*) produced from all these sums (*capitales*) gained and improved during marriage, come into partition,<sup>47</sup> L. 5. tit. 9. lib. 5. Rec. [L. 5. tit. 4. lib. 10. Nov. Rec.] 2d, also the fruits or produce not gathered which shall appear on the vines, trees, &c., or those not yet apparent if the labor bestowed is on land sown,<sup>48</sup> L. 18. tit. 14. lib. 3. *Fuero Real*. 3d, That these fruits or products are always common, although one of the consorts may have more property or means than the other, L. 4. tit. 9. lib. 5. Rec. [L. 3. tit. 4. lib. 10. Nov. Rec.] 4th, That the improvements (*mejoras*) made of plantation, building, &c., are divided,<sup>49</sup> with the difference that if the planting should be done in the particular land of either of the consorts, it shall be divided, deducting first the value the land was of before it was planted, and giving or allowing that to the owner; but if a house hath been built, or an oven or a mill hath been erected on the land of one of them, the person on whose land the building or erection is made, shall have the benefit of it, and shall pay to the other the moiety of what the building cost,<sup>50</sup> L. 9. tit. 4. lib. 3. *Fuero Real*. 5th, That the value of a company or co-partnership, or of an office purchased by husband and wife shall be divided according to its worth at the time of partition, *Ayora*, Part. 1. Cap. 9. n. 16. 6th, That the rents of the estate or inheritance leased out are also to be divided in proportion to the time the marriage continued, for that year, *Ayora*, Part. 1. Cap. 9. n. 5. 7th, But that the crops of grain, (*mieses*) or ripe fruits of the estate which either of the consorts brings into marriage, which were not sown during marriage, do not come into partition; wherefore they shall be deducted from the mass of property,<sup>51</sup> *Ayora*, Part. 1. Cap. 9. n. 3. 8th, Nor shall the improvements made on entailed property (*mayorazgo*) be divided, L. 6. tit. 7. lib. 5. Rec. [L. 6. tit. 17. lib. 10. Nov. Rec.]

From the third principle it arises, 1st, That the marriage being as a soldier for the campaign, was at the joint expense of both him and wife. *Vide* L. 2. tit. 4. lib. 10. Nov. Rec.

<sup>47</sup> That is, the fruits, proceeds, or rents of every description of property belonging to both the wife and husband, are considered *gananciales*. See L. 5. tit. 4. lib. 10. Nov. Rec.

<sup>48</sup> That is, *emblemments* are considered *gananciales*.

<sup>49</sup> i. e. are *gananciales*.

<sup>50</sup> *Palacios* says, that *Febrero* is of opinion, that this rule holds also with respect to improvements in plantation: that is, that the owner of the field or land retains it, paying to the other party the moiety of what the planting or improvement cost.

<sup>51</sup> Not being considered *gananciales*. See 2d. *Blac. Com.* respecting the doctrine of emblemments in England, p. 122, 123, 145. and 403, 15 Ed.

dissolved, the survivor may dispose of his proportion of the property increased (*multiplicados*) without being obliged to reserve the property or dominion<sup>52</sup> (*propiedad*) to his children, L. 6. tit. 9. lib. 5. Rec. [L. 6. tit. 4. lib. 10. Nov. Rec.] 2d, That what the husband might leave to his wife by his will, shall not be understood as coming out of that part of the *gananciales* which belongs to her,<sup>53</sup> L. 7. tit. 9. lib. 5. Rec. [L. 8. tit. 4. lib. 10. Nov. Rec.] 3d, That the husband cannot alienate his property maliciously (*con malicia*), and in fraudulent diminution (*en fraude*) of the *ganancias*,<sup>54</sup> L. 5. tit. 9. lib. 5. Rec. [L. 5. tit. 4. lib. 10. Nov. Rec.] 4th, That neither of them shall forfeit his, or her property, nor half of the *ganancias* by the crime of the other, L. 10. tit. 9. lib. 5. Rec.<sup>55</sup> [L. 10. tit. 4. lib. 10. Nov. Rec.] 5th, That if the widow lives luxuriously and by crime (*por delito*), she shall lose her moiety of the *gananciales*,<sup>56</sup> Ll. 5. and 11. tit. 9. lib. 5. Rec. [Ll. 5. and 11. tit. 4. lib. 10. Nov. Rec.]

From the fourth principle it follows, 1st, That the gains and losses being common, the debts which are contracted during marriage are to be paid out of the common property; but not those contracted before marriage or after its dissolution, L. 14. tit. 20. lib. 3. *Fuero Real*. 2d, That the wife shall not pay half the debts if she should renounce the *ganancias*, L. 9. tit. 9. lib. 5. Rec. [L. 9. tit. 4. lib. 10. Nov. Rec.] 3d, That the loss or injury caused to the real estate (*hacienda*) by reason of the husband having rented it out at a low rate or price, or having paid annuities (*censos*) or debts contracted for an illicit [ 59 ] cause ought not to prejudice<sup>57</sup> the wife; and therefore in these cases the loss or injury must be deducted from the mass of property, and given to the wife before dividing it, *Ayora*, Part. 1. Cap. 8. n. 14. and 15. 4th, That if the children are many, and they are promised *dote*, it shall be paid from the *ganancial* property; and if there be none, from other property;<sup>58</sup> and if the father alone should promise the *dote*, it shall be paid from the *ganancial* property; and in default of that, from his own particular property, L. 8. tit. 9. lib. 5. Rec. [L. 4. tit. 3. lib. 10. Nov. Rec.]

<sup>52</sup> Nor the usufruct, L. 6. tit. 4. lib. 10. Nov. Rec.

<sup>53</sup> She shall have the legacy, bequest, or devise, exclusive of and in addition to her *gananciales*, L. 8. tit. 4. lib. 10. Nov. Rec.

<sup>54</sup> To damnify the wife, L. 3. tit. 5. lib. 10. Nov. Rec. *Palacios* says, that the reason why the husband can dispose, during marriage, of *ganancial* or common property, without the consent of the wife, is, to use the expression of *Covarrubias*, because the husband has the dominion and possession of it in *actu et habitu*, during the marriage; and the wife only in *habitu*, until the marriage is dissolved, when she acquires it equally with her husband.

<sup>55</sup> Forfeiture of property, where in cases that by law it attaches, does not take effect, until sentence (*judicial*) be passed, declaratory thereof. *Vide* L. 10. tit. 4. lib. 10. Nov. Rec.

<sup>56</sup> For the first cause, the *gananciales* will devolve to the heirs of the husband, L. 5. tit. 4. lib. 10. Nov. Rec.

<sup>57</sup> *Palacios* observes, that L. 5. tit. 9. lib. 5. Rec. [L. 5. tit. 4. lib. 10. Nov. Rec.] only annuls the alienations of the husband made advisedly to defraud or prejudice the wife. But in the absence of this purpose, although by the alienations of the husband the wife may find herself prejudiced, there is no law which exempts her from suffering such prejudice.

<sup>58</sup> Each parent's separate property, in the absence of *gananciales*, being chargeable with a moiety of such *dote*, supposing the promise of *dote* should be made by both father and mother, L. 4. tit. 3. lib. 10. Nov. Rec.

## TITLE VIII.

## OF THE DIFFERENCE WITH RESPECT TO CHILDREN (DIFFERENCIA DE HIJOS), AND THE POWER OF THE FATHER (PATRIA POTESTAD).

[ 66 ] UNDER the third division of mankind with respect to their state or capacity as a family, is comprehended the difference with respect to children, and the power which the father has over them, which we call *patria potestad*.

Cap. 1. Children are either legitimate or natural. Legitimate children are those who are born of father and mother that are truly married according to the precept of our holy church, L. 1. tit. 13. P. 4. [L. 1. tit. 13. P. 4.] Hence it follows, 1st, That the child of those who marry openly in the face of the church, although there may afterwards appear an impediment to cause their separation, shall be legitimate, provided both were or one of them was ignorant of the impediment, L. 1. tit. 13. P. 4. [L. 1. tit. 13. P. 4.] 2d, That likewise the child who should be conceived during the judicial agitation of the question respecting the impediment, will be legitimate, L. 1. tit. 13. P. 4. [L. 1. tit. 13. P. 4.] 3d, That those are not legitimate who are born of persons who marry clandestinely, or of those who have married, being aware of an impediment to their marrying, although they should marry in the face of the church, L. 2. tit. 15. P. 4 [L. 2. tit. 15. P. 4.] 4th, That those are not legitimate who are born of parents not married according to the precept or ordinance of the church, L. 2. tit. 15. P. 4. [L. 2. tit. 15. P. 4.] 5th, That neither are the children of a concubine (*barragana*) legitimate, although the father should marry her,<sup>1</sup> L. 2. tit. 15. P. 4. [L. 2. tit. 15. P. 4.] Legitimate children enjoy and inherit the honors of their fathers, grandfathers, &c., are able or competent to receive dignities, and succeed to their fathers and other relations, L. 2. tit. 13. P. 4. [L. 2. tit. 13. P. 4.]

§ 1. Natural children are those who are not born in wedlock according to L. 1. tit. 15. P. 4. [L. 1. tit. 15. P. 4.] These comprehend bastards (*fornecinos*), or the illegitimate children (*nothos*) who are born from adulterous intercourse;<sup>2</sup> the children of prostitutes

<sup>1</sup> This must be understood with respect to children begotten on a concubine by a man during the life of his lawful wife, who should, after the death of his said wife, marry the former. See L. 2. tit. 15. P. 4. *ad fin.*

<sup>2</sup> *Pelacius* says, that so far from L. 1. tit. 15. P. 4., including under the term "natural children" such as are the offspring of adultery, incest, and the rest, mentioned in this part of the text, it says, they are not [considered] natural children, because they are begotten contrary to law, and contrary to natural reason. The learned professor adds that, properly speaking, those are natural children who were born or conceived when their parents could marry without a dispensation, provided the father acknowledge them for

(*manceres*); the spurious (*espurios*), that is, children born of a concubine;<sup>3</sup> and those begotten on a relation, or on a religious woman (*religiosa*), who are called incestuous, L. 1. tit. 15. P. 4. [L. 1. tit. 15. P. 4.] And such do not enjoy the advantages of legitimate children, L. 3. tit. 15. P. 4. [L. 3. tit. 15. P. 4.]

§ 2. Natural children are legitimated by many ways: 1st, By the favor (*merced*) of the king or the pope<sup>4</sup>, L. 4. tit. 15. P. 4. [L. 4. tit. 15. P. 4.] 2d, By testament or last will confirmed by the king, L. 6. tit. 15. P. 4. [L. 6. tit. 15. P. 4.] 3d, By public deed, or instrument of writing, L. 7. tit. 15. P. 4. [L. 7. tit. 15. P. 4.] 4th, By the marriage of a natural daughter with a person of distinction,<sup>5</sup> (*hombre illustre*), L. 8. tit. 15. P. 4. [L. 8. tit. 15. P. 4.] 5th, By the [ 67 ] father offering his natural son for the service of the king, or to the municipal council, Ll. 5. and 8. tit. 15. P. 4. [Ll. 5. and 8. tit. 15. P. 4.]

The effect of these legitimations have in view two ends: 1st, That the son legitimated may be rendered capable of the honor which we have before said belonged exclusively to lawful children, with respect to which we have now to observe, that as the grant of legitimation by the crown does not render the person legitimated capable of enjoying or holding ecclesiastical dignities and employments, (*beneficios*), so neither does that of the pope render him competent to obtain secular honors: and that even with respect to ecclesiastical, the grantee cannot obtain any other kind (*pieza*) than that expressed in the dispensation, L. 4. tit. 15. P. 4. [L. 4. tit. 15. P. 4.] The other end or object of legitimation is to qualify the persons legitimated to succeed to the property of their fathers in default of legitimate children. See [Ll. 4, 5, 6, 7, and 8. tit. 15. P. 4.,<sup>6</sup> [Ll. 4, 5, 6, 7, and 8. tit. 15. P. 4.,] in which will be found the forms of each of these modes of legitimation, (*de estos actos*.)

Cap. 2. *Patria potestad* is the power which fathers have over their children,<sup>7</sup> L. 1. tit. 17. P. 4. [L. 1. tit. 17. P. 4.] This definition declares that this power belongs exclusively to the father, and is not possessed by the mother nor her relations, L. 2. tit. 17 P. 4. [L. 2. tit. 17. P. 4.] We must consider this power very far short of that right of life and death which the laws of Rome allowed over children, particularly if we reflect that our customs and laws had their rise from Christianity, which comprises all that is just and humane; wherefore this power must be considered as useful to the child, since

his, or had in his house the woman on whom he begot them, L. 9. tit. 8. lib. 5. Rec.; L. 1. tit. 5. lib. 10. Nov. Rec. That in respect to children born from an incestuous or an adulterous intercourse, and the others mentioned, they can only be called natural in the improper and general understanding of the word.

<sup>3</sup> The law [L. 1. tit. 15. P. 4.] adds, who lives out of the house of the father.

<sup>4</sup> The first with respect to temporal, and the second with respect to spiritual concerns. See L. 4. tit. 15. P. 4.

<sup>5</sup> Or superior municipal magistrate. See L. 8. tit. 15. P. 4.

<sup>6</sup> And L. 7. tit. 20. lib. 10. Nov. Rec.

<sup>7</sup> Born in lawful wedlock. See Ll. 1. and 2. tit. 17. P. 4.



it consists properly of a protecting or economical (*economico*) dominion which the father exercises over his legitimate child. From this principle it proceeds, 1st, That fathers are bound to rear, give aliment to, and educate their children who are under their power, L. 3. and 5. tit. 19. P. 4.<sup>8</sup> [L. 3. and 5. tit. 19. P. 4.] 2d, That they are allowed to chastise them with moderation, L. 18. tit. 18. P. 4.<sup>9</sup> [L. 18. tit. 18. P. 4.] 3d, That they are bound to direct and advise them properly, L. 18. tit. 19. P. 4.<sup>10</sup> [L. 18. tit. 19. P. 4.] 4th, To administer, to take care of, and defend, as well judicially as otherwise, the *adventitious* property (*bienes adventicios*) of their children, enjoying the usufruct of it,<sup>11</sup> and the dominion of their *profectitious* property, (*bienes profecticios*,) L. 5. tit. 17. P. 4., [L. 5. tit. 17. P. 4.,] although the *peculium*<sup>12</sup> or stock, (*pegujar*,) that is, the property which the sons acquire in the army or in the service of the king at court, belongs in entire dominion to them, L. 6. and 7. tit. 17. P. 4. [L. 6. and 7. tit. 17. P. 4.] 5th, They are bound to appear for them in suits at [ 68 ] law, whether as defendants or plaintiffs,<sup>13</sup> L. 11. tit. 17. P. 4. [L. 11. tit. 17. P. 4.,] except in the two cases pointed out by L. 12. tit. 17. P. 4. [L. 12. tit. 17. P. 4.] 6th, Children may be compelled by the judge to return to their father's protection or guardianship, and power if they are vagrants, L. 10. tit. 17. P. 4. [L. 10. tit. 17. P. 4.]

§ 1. There are four modes by which this power is acquired or established: 1st, By lawful marriage. 2d, By sentence or decree of the judge declaring the child to be legitimate, respecting which there was a doubt. 3d, By the crime which the child should commit against the father who freed or emancipated it. 4th, By adoption, L. 4. tit. 17. P. 4. [L. 4. tit. 17. P. 4.]

From the first mode it follows, 1st, That those who are under the *patria potestud* shall be legitimate children, L. 2. tit. 17. P. 4. [L. 2. tit. 17. P. 4.] 2d, Those legitimated, by reason of being regarded as legitimate, L. 4. tit. 15. P. 4. [L. 4. tit. 15. P. 4.] 3d, But not natural children and others who are found comprehended under this title, L. 2. tit. 15. P. 4. [L. 2. tit. 15. P. 4.] The second mode of acquiring this power is evident.

<sup>8</sup> See also L. 2. tit. 19. P. 4.

<sup>9</sup> See also L. 9. tit. 8. P. 7.

<sup>10</sup> This quotation is erroneous. There is no such law in the title of the *Partida* referred to. *Palacios* cites the beginning, and L. 1. and 2., of tit. 19. P. 4. as confirming this doctrine.

<sup>11</sup> This the fathers lose on the marriage of their children; by marriage the latter are emancipated. See L. 3. tit. 5. lib. 10. Nov. Rec.

<sup>12</sup> And the property or fee simple of every other sort, except that which is *profectitious*, is in the sons; but of the *peculium* mentioned in the text, the father is not entitled to the usufruct, as he is to that of the other adventitious property of his son, and this is expressed by the term, *con toda propiedad*, made use of in the text. See Gl. 8. Greg. Lop. on L. 6. tit. 17. P. 4.

<sup>13</sup> *Palacios* remarks, that what L. 11. tit. 17. P. 4. says, is, that the child under the paternal power, cannot sue or be sued without the authority or consent of the father, unless in the two excepted cases alluded to in the text.

The ingratitude of the son towards the father who emancipated him, causes his return a second time under his power; and this crime must be proved to have been committed<sup>14</sup> by word or by deed which has produced dishonor or discredit to the father, L. 19. tit. 18. P. 4. [L. 19. tit. 18. P. 4.]

The fourth mode consists in adoption; which is a way by which the laws have established that men may become the sons of another although they may be not so naturally, L. 1. tit. 16. P. 4.

This adoption is in two ways, 1st, When children are adopted who are not under the power of any other person.<sup>15</sup> 2d, When children are adopted who are under the power of their lawful father,<sup>16</sup> L. 1. tit. 16. P. 4. [L. 1. tit. 16. P. 4.] In order that either of these modes of adoption may be valid, the consent of the person to be adopted is requisite; in the first mode manifestly or expressly, and in the second tacitly, L. 1. tit. 16. P. 4. [L. 1. tit. 16. P. 4.] The first mode of adoption is done only under the authority of the king, and is called *arrogatio*, L. 8. tit. 16. P. 4. [L. 8. tit. 16. P. 4.], and the second with the consent of the judge, and is called *adoptio*, L. 8. tit. 16. P. 4. [L. 8. tit. 16. P. 4.] The forms of both are found in L. 7. tit. 7. P. 4. [L. 7. tit. 7. P. 4.]

Adoption is founded on this principle, "that it ought to imitate nature." Whence it follows, 1st, That only the person can adopt who is not under the power of another, L. 2. tit. 16. P. 4. [L. [ 69 ] 2. tit. 16. P. 4.] 2d, That the person to be adopted must be above 18 years of age, L. 2. tit. 16. P. 4. [L. 2. tit. 16. P. 4.] 3d, That there must not exist any natural impediment to his having children, L. 2. tit. 16. P. 4. [L. 2. tit. 16. P. 4.] Wherefore, 4th, If this impediment has arisen from disease or misfortune he may adopt, L. 3. tit. 16. P. 4. [L. 3. tit. 16. P. 4.] 5th, That a woman cannot adopt, unless it be for her alleviation and consolation, having lost a son in the service of the king or of some council or corporation; but then she must have the royal sanction for it, L. 2. tit. 16. P. 4. [L. 2. tit. 16. P. 4.]

As with respect to adoption, the express or tacit consent, and the evident advantage of the person adopted are considered necessary, it has been established, 1st, That the fatherless minor of seven years cannot be adopted, nor can the youth above seven and under fourteen be adopted, unless by the intervention of the royal will, under the cognition of the advantage which will result to the person adopted, and the obligation of the adopter to restore the property of the young person to his legitimate successors or heirs, if he should die before fourteen years of age, L. 4. tit. 16. P. 4. [L. 4. tit. 16. P. 4.] 2d, That the guardian cannot adopt his ward by reason of the suspicion under which he might fall; and he can only do it when the ward has attained

<sup>14</sup> *Voluntarily*; for if the child hath been driven to such ingratitude by the conduct of the father, in the cases set forth in L. 18. tit. 18. P. 4. it does not produce the effect mentioned in the law L. 19. tit. 18. P. 4. quoted in the text. See Gl. 1. *Greg. Lop.* on L. 19. tit. 18. P. 4.

<sup>15</sup> *Sui juris*.

<sup>16</sup> *Alieni juris*.

25 years of age, and with the royal permission, L. 6. tit. 16. P. 4. [L. 6. tit. 16. P. 4.]

Adoption produces the effect of subjecting the adopted to the power of the adopter,<sup>17</sup> although with some difference in what relates to the succession as expressed by Ll. 7. 8. and 9. tit. 16. P. 4.<sup>18</sup> [Ll. 7. 8. and 9. tit. 16. P. 4.]

§ 2. The father's power is put an end to by four causes or modes, 1st, By natural death. 2d, By perpetual banishment, which is called civil death. 3d, By the exaltation of the child to dignity or office. 4th, By emancipation, *Princip. del. tit. 18. P. 4.*

The first mode is understood to take place, if the father who died was not, at the time of his death, under the power of his own father; because in this case the son whom he left would fall under the power of his grandfather according to L. 1. tit. 18. P. 4. [L. 1. tit. 18. P. 4.]; although by the law of the *Recopilacion* another consequence would result as we shall see.

To the second mode belongs, 1st, Perpetual banishment of the father to an island or other certain place, which is the *deportatio* of the Romans. 2d, Perpetual condemnation to the public works, [ 70 ] mines, &c., L. 2. tit. 18. P. 4. [L. 2. tit. 18. P. 4.] 3d, Those outlawed or proscribed for ever, L. 4. tit. 18. P. 4. [L. 4. tit. 18. P. 4.] 4th, But not those transported for a determinate time, or for ever, without confiscation of their property, who are called "*relegados*," L. 3. tit. 18. P. 4. [L. 3. tit. 18. P. 4.] 5th, Nor those outlawed for a certain time, L. 4. tit. 18. P. 4.<sup>19</sup> [L. 4. tit. 18. P. 4.]

The greater part of the twelve dignities, of which mention is made in the 18th Title, 4th Partida, from L. 7. to L. 15. [L. 7. ad 15. tit. 8. P. 4.], are not recognised at this day; but, arguing from them, we may say, that generally every dignity or office (*dignidad*) which may have jurisdiction annexed to it, and every ecclesiastical dignity,<sup>20</sup> is sufficient to withdraw the child from the power of the father; because it is not regular that he who judges others, or is in the exercise of any office or employment, should be governed by another.

With regard to emancipation, it is laid down, 1st, That this may

<sup>17</sup> *Palacios* says, that in *adopcion en especie*, the adopted is not subject to the power of the adopter, unless the latter be his ascending relative. He refers to Ll. 9. and 10. tit. 16. P. 4.

<sup>18</sup> These laws also point out the different effects of *arragatio* and *adoptio*; and see also L. 7. tit. 7. P. 4. *Palacios* refers, for an elucidation of this subject, to L. 5. tit. 6. lib. 3., L. 1. tit. 22. lib. 4. *Fuero Real*. L. 1. and 10. tit. 8. lib. 5. Rec. [L. 11. tit. 20. lib. 10. Nov. Rec.] to *Greg. Lopez*. Gl. 5. lib. 8. tit. 16. P. 4. and *Azevedo*, on L. 1. tit. 8. lib. 5. Rec.

<sup>19</sup> *Palacios* says, those condemned to transportation, or banishment for life, to any place or public work, with confiscation of property, forfeit the paternal power; but not so in the absence of confiscation of property: that the same right and distinction are observed in respect to persons outlawed: that those are so termed, who have been cited and summoned for any crime which they have committed, and, not having chosen to obey, are banished (*desterrados*) for this reason, from the place where they reside, or are prevented to enter their country.

<sup>20</sup> *Palacios*, in a note, here remarks, that children married (*casados y velados*) are released from the paternal power, L. 8. tit. 1. lib. 3. [L. 3. tit. 5. lib. 10. Nov. Rec.]

be done before an ordinary judge,<sup>21</sup> L. 15. tit. 18. P. 4. [L. 15. tit. 18. P. 4.] And on his previously giving information of it to the council, Aut. 20. tit. 9. lib. 3. Rec. [L. 4. tit. 5. lib. 10. Nov. Rec.] 2d, That the father and the son declare before the judge their desire or will, the one of emancipating, and the other of being emancipated, L. 17. tit. 18. P. 4.<sup>22</sup> [L. 17. tit. 18. P. 4.] 3d, That the child being under seven, the father must petition the king for his license to emancipate it; and, without this permission, the judge of the place where the father is shall not be able to proceed to the act or decree of emancipation, the which, in the above case, may be done in the absence of the child; but if the child should be above seven, in addition to the royal authority, it is required that the child consent, or express his desire before the judge to be emancipated, L. 16. tit. 18. P. 4. [L. 16. tit. 18. P. 4.] 4th, That children who are married are considered emancipated, L. 8. tit. 1. lib. 5. Rec. [L. 3. tit. 5. lib. 10. Nov. Rec.] In virtue of which their children shall not fall under the power of the grandfather on the death of their father; because, by the act of marriage, the latter was freed from his father's power. The judge may, by his office, oblige fathers to emancipate their children for four causes. 1st, For cruelly chastising the child. 2d, For prostituting his daughters. 3d, For possessing that which was bequeathed them, under condition of emancipating the child. 4th, For misspending the property of, or misconducting themselves towards the adopted child, L. 18. tit. 18. P. 4. [L. 18. tit. 18. P. 4.]

<sup>21</sup> And with the consent of the son. See Ll. 15. and 17. tit. 18. P. 4.

<sup>22</sup> The L. 17. tit. 18. P. 4. quoted, adds, the emancipation must be by *carta*, or written instrument.

## BOOK II.

## OF THINGS.

## TITLE I.

## OF THE DIVISION OF THINGS.

[ 72 ] CAP. 1. WE have treated hitherto of the first object of law, which relates to persons; we proceed now to treat of the second, which relates to things. The term thing is applied to whatever is of such a condition, that it may be counted among our property.

The first general division of things is that which is made into things of divine right, and those of human right. The first are divided into things sacred and religious. The latter into things common, public, of a corporation or a university, and private.

Cap. 2. Every sacred thing is established for the service of God; and therefore the dominion of such is not in any person and cannot be counted as property, L. 12. and 2. tit. 28. P. 3. [L. 12. and 2. tit. 28. P. 3.], as are churches, altars, chalices, &c., L. 13. tit. 28. P. 3. [L. 13. tit. 28. P. 3.]

Cap. 3. We term religious, that place where any one is buried in order never to be removed thence, and if all his body or at least his head lies there,<sup>1</sup> L. 14. tit. 28. P. 3. [L. 14. tit. 28. P. 3.]

Although our laws may have borrowed these divisions from paganism, nevertheless, since the solemn consecration of churches and cemeteries has been established, we are of opinion that immediately upon being consecrated, religion occupies them and cannot be separated from them at any time. The consequences therefore which result from this principle ought to be explained by the canon law.

Cap. 4. Things common, are those which belong to the birds, to the beasts, and to all other living creatures as being able to make use of them as well as men, L. 2. tit. 28. P. 3. [L. 2. tit. 28. P. 3.] such are the air, the waters from Heaven, the sea and its shore, L. 3. tit. 28. P. 3. [L. 3. tit. 28. P. 3.] By shore of the sea we understand whatever part of it is covered with water, whether in winter or summer, L. 4. tit. 28. P. 3. [L. 4. tit. 28. P. 3.] Hence it arises that any one may fish or navigate on the sea and on its shore, where also he

<sup>1</sup> *Palacios* says, that in Spain no place is considered religious, unless made so by the authority of the church, *Can. in Eccles. c. 13. 9. 2. cap. 4. De Religdom. Selvag. Inst. can. tit. 14. lib. 2.*

may build a cottage or house for shelter,<sup>2</sup> Ll. 3. and 4. tit. 28. P. 3. [Ll. 3. and 4. tit. 28. P. 3.]

Cap. 5. Things public are those which belong only to mankind, L. 2. tit. 28. P. 3. [L. 2. tit. 28. P. 3.] Hence it is, 1st, That rivers, ports, or harbors, and high roads (*caminos*), are things public, L. 6. tit. 28. P. 3. [L. 6. tit. 28. P. 3.] 2d, The walls and gates of towns or cities according to L. 20 tit. 32. P. 3. and L. 3. tit. 5. lib. 6. and L. 3. tit. 6. lib. 7. Rec. [L. 20. tit. 32. P. 3. L. 5. tit. 1. lib. 7. and L. 2. tit. 18. lib. 6. Nov. Rec.], are public in their benefits to all; wherefore the obligation to repair them is common to all, although L. 15. tit. 28. P. 3. [L. 15. tit. 28. P. 3.] classes them among things holy, adopting in this the doctrine of the Romans. 3d, That not only may the natives or inhabitants of a place make use of things that are public, but also strangers, L. 6. tit. 28. P. 3. [L. 6. tit. 28. P. 3.] That although the banks of rivers may belong to persons on whose estates they are situate, nevertheless they cannot prevent any one from making fast his boats or vessels (*sus embarcaciones*) to the trees or posts in them, and doing all that may be convenient for the free use of the things which belong to the art, calling, or industry, by which he makes his livelihood, L. 6. tit. 28. P. 3. [L. 6. tit. 28. P. 3.] 5th, That notwithstanding he whose grounds are planted on the bank of the river, may be the proprietor of the trees, he cannot cut that to which any boat or vessel hath been moored or to which a person may be desirous to moor one, L. 7. tit. 28. P. 3. [L. 7. tit. 28. P. 3.] 6th, That no new mill nor any other thing can be built on the part of the river by which its navigation may be impeded, and any old building may be destroyed or pulled down which obstructs the common use of these things, L. 8 tit. 28. P. 3., [L. 8. tit. 28. P. 3.] 7th, That neither can any building or thing be erected by which the common use of high roads, squares, or market places (*plazas*) any [ 74 ] threshing grounds for corn, &c. (*exidos*), churches, &c. may be obstructed, [Ll. 22, 23, and 24. tit. 32. P. 3. [Ll. 22, 23, 24. tit. 32. P. 3.]

Cap. 6.<sup>3</sup> Things belonging to a corporation or university, are those which belong exclusively to the inhabitants (*al comun*) of any city, town, or castle, or any other place where men reside, L. 2. tit. 28. P. 3. [L. 2. tit. 28. P. 3.]: of these some may be used by any inhabitant of that city, town, or place, and others are for the particular use of the corporation (*concejo*), which ought to apply the fruits, produce,

<sup>2</sup> The 6th condition on which lands are declared to be granted by the crown in Trinidad is, that three chains on the sea coast, comprehending fifty paces from the height of the spring tides, be held reserved for the use of his Majesty and the public service. See proclamation 5th December, 1815. Appendix L.

<sup>3</sup> A Memoir on the advancement of Agriculture, and on Agrarian Laws in Spain, addressed to the Supreme Council of Castille, by the Patriotic Society of Madrid, and drawn up by one of its members, *Don Gaspar Melchor de Jovellanos*, points out as obstacles to the progress of agriculture in Spain, the regulations and enactments treated of in the sequel of this title: this memoir is inserted in *Laborde's View of Spain*, 4th vol. Translation, p. 111.

or rents, to the common benefit of the city or town, Ll. 9. and 10. tit. 28. P. 3. [Ll. 9. and 10. tit. 28. P. 3.]

Of the first description are fountains or springs, places where they hold markets, and fairs, and places where the corporation meet, sandy beaches or grounds (*arenales*), which are on the banks of rivers, and, finally, commons or pasture grounds (*dehesas*), L. 9. tit. 28. P. 3. [L. 9. tit. 28. P. 3.] Of the second kind are flocks, fields, vineyards, olive plantations and lands, which produce fruit and rent, L. 10. tit. 28. P. 3. [L. 10. tit. 28. P. 3.] The great variation which is observed in this principal part of our jurisprudence renders its comprehension very difficult; and therefore for greater clearness it is necessary to treat of each thing separately.

§ 1. With respect to what relates to the use of forests or woods (*montes*) and the commonable lands<sup>4</sup> of a corporation or municipal body (*terminos de concejo*), it is to be observed, that the abuse arising from their occupancy by many private individuals without the royal license gave rise to the following orders or provisions, 1st, That every common (*termino*) or forest (*monte*) occupied should be restored to the corporation or municipal body to which it belonged; and when once restored, should not be transferred or sold, nor the pastures ploughed or converted (*ni romper sus exidos*) into arable lands, L. 1. tit. 7. lib. 7. Rec. [L. 2. tit. 21. lib. 7. Nov. Rec.] 2d, That from this restitution the clerk or officer (*oficial*) of the corporation shall not be excepted, under pain or loss of office, and of being rendered unfit to hold it, L. 2. tit. 7. lib. 7. Rec. [L. 4. tit. 21. lib. 7. Nov. Rec.] The process and mode which are to be observed by the judges in such restitution are prescribed by L. 3. tit. 7. lib. 7. Rec., [L. 5. tit. 21. lib. 7. Nov. Rec.,] conformable (*arreglada*) to L. 18. of *Toro*,<sup>5</sup> and the modifications laid down in Ll. 4. and 5. tit. 7. lib. 7. Rec. [Ll. 6. and 7. tit. 21. lib. 7. Nov. Rec.] 3d, Those commons (*terminos*) occupied or sold without the royal license, ten years previous to the year 1551, in which the law of King Charles I. was published, were required to be reconverted into pasture ground, giving information to the council of what part might have been worked or cultivated by the permission of the municipality (*pueblo*). L. 6. tit. 7. lib. 7. Rec. [L. 4. tit. 25. lib. 7. Nov. Rec.] 4th, That vineyards, orchards, or buildings made on common (*termino*) belonging to the king or a corporation, with the [ 75 ] license of the council possessed for twenty years, shall not be destroyed or pulled down, but the person who possesses it shall pay an annual tax or rent (*censo*) at the rate of five maravedis for every acre of vineyard; and so proportionally, L. 3. tit. 7. lib. 7. Rec.<sup>6</sup> [L. 5. tit. 21. lib. 7. Nov. Rec.] 5th, That the buildings given up on account of improper occupation, shall not be destroyed, nor the forests

<sup>4</sup> Perhaps the best English term for *termino*, is, *common because of vicinage*.

<sup>5</sup> L. 18 of *Toro* does not apply.

<sup>6</sup> This law does not seem to apply.

or woods (*montes*) already planted, be felled or laid waste, except they should be so extensively planted, that the people can cut estovers (*leña*),<sup>7</sup> which shall be done, so as to leave the two principal boughs on the trees (*dexando horca y pendon*), that they may grow again, and never to cut the trees at the trunk or foot, allowing the smaller branches (*montes*) to remain for pasturage,<sup>8</sup> L. 7. tit. 7. lib. 7. Rec., [L. 1. tit. 24. lib. 7. Nov. Rec.] all which hath been extended to the forests or woods belonging to private individuals, L. 28. tit. 7. lib. 7. Rec. [Nota 1. tit. 24. lib. 7. Nov. Rec.] 6th, That no grants (*mercedes*) may be made of commons (*terminos*) by the king, corporation, nor judges, L. 10. tit. 7. lib. 7. Rec. [L. 8. tit. 21. lib. 7. Nov. Rec.] 7th, Nor may justices grant commonable lands without royal license, L. 11. tit. 7. lib. 7. Rec. [L. 9. tit. 21. lib. 7. Nov. Rec.]

Also, in consideration of the utility of these public forests or woods (*montes*), it hath been ordered, 1st, That the planting of trees should be attended to according to the quality of the soil, the old forests (*montes*) being preserved, and watches (*guardas*) placed thereover; for which purpose the justices shall visit every year the said forests, and take care that the penalties expressed in the ordinance be carried into effect, L. 15. tit. 7. lib. 7. [L. 2. tit. 24. lib. 7. Nov. Rec.] which must be confirmed by the council, L. 13. tit. 1. lib. 7. Rec. [L. 16. tit. 3. lib. 7. Nov. Rec.] 2d, That the corregidores, or magistrates, who should be remiss in the fulfilment of these laws, shall lose a third of their salary, L. 16. tit. 17. lib. 7. Rec.<sup>9</sup> all which hath been expressed more fully in the ordinances of the 7th and 12th December, 1748,<sup>10</sup> which direct, that no trees shall be cut without permission of the justice; and that for every old tree cut, five young ones shall be planted: all felling or burning of public groves (*alamedas*), with walks, mountains, woods, &c., is forbidden; and it is ordered, that each inhabitant shall plant every year five trees in the situations which should appear best to the corregidor; and not having them, acorns (*bellota*) may be planted at his discretion. That the justices may take cognisance of this, and not the audiencias nor chanceries, with appeal to the board (*junta*) of works and woods. The ordinance was extended to the forests of private individuals by the *cédula* of 18th October, 1763.<sup>11</sup>

It is to be observed here, that for the preservation of trees [76]

<sup>7</sup> The translator trusts he will not be considered as taking too great a liberty in the translation of the text, by the application of English law terms to express what he may conceive its meaning. The comprehension of this part of Spanish jurisprudence is inserted in the text to be very difficult, and it may be truly added, of little or no interest; and to an English reader, it is therefore hoped, that an allowance will be made for the adoption of terms which, perhaps, will be generally found to convey the correct meaning of the original.

<sup>8</sup> Or rather for the purpose of furnishing acorns, and for the support or protection of the cattle in winter. See L. 1. tit. 24. lib. 7. Nov. Rec., quoted.

<sup>9</sup> Not noticed in *Nov. Rec.*

<sup>10</sup> Forming L. 16. tit. 24. Lib. 7. Nov. Rec.

<sup>11</sup> *Nota* 18. tit. 24. Lib. 7. Nov. Rec.



and forests, (*montes*), and their appropriation to the building of vessels, the most excellent regulations or provisions have been enacted in our Spain, Autos 4, 5, and 6. tit. 7. lib. 7. Rec., and Auto 6. tit. 7. lib. 7. Rec.,<sup>13</sup> [Ll. 12. and 13. tit. 24. lib. 7. Nov. Rec.,] and the very full *Cédula* of January, 1748,<sup>13</sup> regard this object; the latter of which treats, as fully as can be wished, upon the proper care of the trees, the mode of bringing them to the ports, and other things with which the intendants of marine in particular ought to be acquainted.

§ 3. Not less useful are the pastures (*dehesas*) for the common support of flocks. Thus, therefore, L. 27. tit. 7. lib. 7. Rec., [L. 9. tit. 25. lib. 7. Nov. Rec.,] published in 1623, gives instructions respecting the preservation of the pastures of the kingdom, and orders, 1st, That the pastures be examined and measured by the justices, with two persons commissioned, one by the council or corporation, and the other by the council of the Mesta. 2d, That they fix or measure the quantity, point out the owners of the said pastures, and the quantity of stock the pastures can support or feed. 3d, That with the assistance of the fiscal, named by the Mesta of the officiating alcalde, (*alcalde entregador*), and of the Escribano, the quantity of pasture that shall have been approved<sup>14</sup> or broken up, (*de lo que se hubiere rompido*), be ascertained by actual inspection. 4th, That the pastures of each town be inserted in their books, and reports of them transmitted to the respective chanceries; and the general report be kept in the council, or corporation, and a corresponding one in the council of the Mesta. 5th, That the pastures broken up, or approved without permission since the year 1590, and those broken up since the conclusion of the term allowed, be re-converted into pasture, the which provision in this respect is conformable with the spirit of Ll. 22. and 23. tit. 7. lib. 7. Rec., [Ll. 5. and 8. tit. 25. lib. 7. Nov. Rec.,] in which the same hath been established; and the last law explains, that by pasture broken up must not be understood *that which has been broken up in one part only*. But, in order to prevent these approvments, or these conversions of pastures into arable lands, (*rompimientos*), it is ordered by the royal cédulas of 30th December, 1748, and 13th January, 1749, that positively no permission may be given to break up pastures, and that those broken up twenty years before be restored to their former state, (*a pastos*).

§ 4. With respect to the matter of pastures, (*pastos*), regard is chiefly had to immemorial custom; wherefore, 1st, Although L. 7. tit. 29. P. 3. [L. 7. tit. 29. P. 3.] says, that things public, as pastures, (*dehesas*), grounds for threshing corn, (*exidos*), &c., are not prescribed, this must not be understood with respect to immemorial prescription,<sup>15</sup>

<sup>13</sup> Not noticed in *Nov. Rec.*

<sup>14</sup> L. 22. tit. 24. lib. 7. Nov. Rec.

<sup>15</sup> Approved, is an old English law expression, signifying to enclose or improve, on the part of the lord of the manor, waste or common.

<sup>16</sup> Immemorial prescription or custom, would seem to comprise a period of forty years. See L. 1. tit. 17. lib. 10. Nov. Rec.

as, says *Otero de pascuis*, Cap. 17., and he takes his dictum [ 77 ] from L. 1. tit. 15. lib. 4. Rec. [L. 4. tit. 8. lib. 11. Nov. Rec.] 2d, That whether the waste lands (*los baldios*<sup>16</sup>) belong to the lord of the place, or manor, or to the corporation, (*concejo*), shall depend upon immemorial possession, *Otero*, same word, c. 9. n. 18. 3d, That although the acts of particular persons may not prejudice the university or community, (*universidad*), the right of pasture (*pasto*) may, notwithstanding, be acquired by the acts of the inhabitants, *Otero*, c. 20., who treats of the interruption of these acts in c. 21. 4th, That the pastures (*pastos*) and commons (*terminos*) of desert and uninhabited places be adjudged to the immediate or neighboring places, *Otero*, c. 23. a. n. 14. ad 18.

Besides this immemorial possession, the right of pasturage is common to every inhabitant of the place, that is, who may have houses or possessions in the town, L. 9. tit. 28. P. 3.; [L. 9. tit. 28. P. 3.;] *Otero*, c. 4. n. 33.; so that the establishment of pasture cannot be impeded, Ll. 1. and 2. tit. 7. lib. 7. Rec. [Ll. 2. and 4. tit. 21. lib. 7. Nov. Rec.] In the number of the inhabitants are included the villagers (*los aldeanos*) attached to the city or town, L. 3. tit. 6. lib. 7. Rec. [L. 2. tit. 18. lib. 6. Nov. Rec.] Hence it results, 1st, That persons not inhabitants cannot make use of the pastures,<sup>17</sup> (*pastos*), L. 9. tit. 28. P. 3. [L. 9. tit. 28. P. 3.] 2d, That the pasture-keeper, although he has no jurisdiction, may seize the cattle which shall not belong to the place, L. 7. tit. 4. lib. 4. *Fuero Real*. 3d, That the cattle so seized must not be ill-treated, withheld, or impounded, only unless it shall be to oblige the party to whom the cattle may belong, to pay the damage assessed by appraisers, and proved by witnesses, *Otero*, c. 15., and the penalty which the town or municipality (*el pueblo*) shall impose, which privilege or power is given to it by L. 15. tit. 7. lib. 7. Rec. [L. 2. tit. 4. lib. 7. Nov. Rec.] 4th, That the forests (*montes*) which shall be burnt, may not be depastured on until the council or corporation be informed, and give what order may seem fit to it on the occasion, L. 21. tit. 7. lib. 7. Rec. [L. 7. tit. 2. lib. 4. Nov. Rec.] 5th, That the action to recover the penalty (*á penar*) is popular; and thus every inhabitant may institute a suit for it, L. 10. tit. 11. P. 3., [L. 10. tit. 11. P. 3.,] and the expenses of the suit shall be paid from the property or funds of the municipality, (*pueblo*), L. 3. tit. 7. lib. 7. Rec. [L. 5. tit. 21. lib. 7. Nov. Rec.] See *Otero*, c. 29. 6th, The town, however, which may have plenty of pasturage, ought to concede, from its superabundance, to the neighboring town, which is deficient, *Otero*, c. 29. 7th, That cartmen may depasture their oxen and mules by the way on the public commons, (*terminos*), and even cut wood,<sup>18</sup> Ll. 3. and 4. tit. 19. lib. 6. Rec. [Ll. 3. and 4. tit. 28. lib. 7. Nov. Rec.]

<sup>16</sup> *Baldio* is land that is neither arable nor pasture.

<sup>17</sup> Are not entitled to a right of common.

<sup>18</sup> For *carboto* and *firebote*.

[ 78 ] The right of common granted to a municipality (*pueblo*) is perpetual, *Otero*, cap. 23. n. 3.; and is considered as *reality* on which rent or revenue (*censo*) may be raised, *Otero*, cap. 27. n. 8. and 9.; and if the pasture (*pasto*) is granted to any particular person, it is only understood to be for the number or head of stock (*para cabezas*) that he possesses at the time of the grant, *Otero*, cap. 24. The town may also rent or farm out the grass, in which case it must pay a tax or duty (*alcabala*), as partaking somewhat of the contract of sale, *Otero*, cap. 36.; and such can only be rented by a person who shall keep cattle, and on the condition only of profiting by the quantity of grass necessary for his own use and of one-third part more L. 24. tit. 7. lib. 7. Rec.<sup>19</sup> [L. 6. tit. 25. lib. 7. Nov. Rec.]

§ 5. The following regulations or orders have in view the increase and conservation of pasture grounds (*pastos*). 1st, That the corregidor must visit the districts (*terminos*) to mark the limits of the commons, with a citation to the party interested, *Otero*, cap. 23. n. 2 and 3.; the 3d and following laws of tit. 7. lib. 7. Rec. [Titles 21. 24, 25. 32. lib. 7. Nov. Rec.] enacting penalties against those who confuse or remove the boundaries. 2d, That if the commons or waste lands of a town are sold, the preference of purchase must be given to the corporation, L. 55 tit. 5. P. 5.<sup>20</sup> [L. 55. tit. 5. P. 5.] 3d, That the commons (*terminos*) of Avila, and of the cities, towns, and places of the kingdom of Grenada, may not be converted into arable lands,<sup>21</sup> Ll. 13. and 14. tit. 7. lib. 7. Rec. [Ll. 2. and 3. tit. 25. lib. 7. Nov. Rec.]; which provision *Lagunex de Fruct.* Part. 1. cap. 7. n. 82. [L. 3. tit. 10. lib. 10. Nov. Rec.], believes to be general with respect to the whole kingdom. 4th, The cedula of 26th May, 1770, which was an advised (*accordada*) correction of that of 18th March, 1768,<sup>22</sup> has in view also the conservation of the pastures (*dehesas*), by which the instruction issued in the preceding year with respect to the division of the lands for husbandry, and the commons (*pastos*) of Estremadura was made general for all Spain; and therefore attention must be paid to it, and not to the other two which are anterior. It must also be mentioned here, 5th, That for every thousand ewes and rams, there must be five breeding cows kept; and that every person who works two pairs of oxen, or one of mules, may bring to the common of the corporation, which is appropriated only for cattle of labor, one un-

<sup>19</sup> An English reader would doubtless feel more than astonishment at being told, that, by this law, a person not possessing any cattle or stock, who should farm or hire the herbage of a pasture (*dehesa*), shall forfeit half his property, and not having any property, shall receive corporal punishment of one hundred stripes (*azotes*).

<sup>20</sup> The law 55. tit. 5. P. 5., quoted in the text, does not particularly apply. It relates to the preference of purchase given to copartners, or joint tenants, over third persons, in regard of the partnership or joint property.

<sup>21</sup> The word in the text is *adehesar*; but a reference to the laws 2, and 3, quoted, has induced the translator to suppose it a typographical error, and to substitute the word *dehesar*, which is the opposite of *adehesar*.

<sup>22</sup> See note 11. tit. 25. lib. 7. Nov. Rec.

tamed (*cerri!*) breeding cow, L. 25. tit. 7. lib. 7. Rec. [L. 7. tit. 25. lib. 7. Nov. Rec.]

§ 6. To complete the understanding, as to what relates to commons (*pastos*) and the use of public pasture grounds, (*dehesas publicas*), we will explain, although briefly, the constitution of the [ 79 ] noble council or corporation of the Mesta,<sup>23</sup> which has under its jurisdiction and laws the graziers of the kingdom of Castille, in order that their cattle may be preserved, and that the state may derive the advantages which are experienced from its proper dispositions.

§ 7. In the *Fuero Juzgo* are found various regulations for the increase and benefit of the cattle, upon which must have been formed this celebrated council, its laws, and privileges. Both were found dispersed, until they were ordered to be collected, (*recopilar*), in the last century. The most modern edition of this body of laws is that published in 1731, by *Don Andres Diez Navarro*, fiscal of the council, entitled "A Memorandum (*Quaderno*) of the Laws and Privileges of the Honorable Council of the Mesta." It is divided into three parts. In the first, are set forth sixty-four privileges in favor of the council. In the second, are contained the existing laws and ordinances. In the third, is an index of the opinions or judgments, (*proposiciones*), showing their agreement with the royal laws.

§ 8. The assembly or council of the Mesta is very ancient in Spain; for Alonso the Wise makes mention of it in the first grant, (*privilegio*), which is that of the 2d September, 1311. It appears, that it had *alcaldes*, (*entriguadores*),<sup>24</sup> and a fixed place for holding general meetings, and also migratory or travelling (*transhumantes*) flocks, according to *Privil.* 3.

§ 9. At present it is governed by the following laws: 1st, In each year it must hold two councils, one in Estremadura, on the 4th of March, and the other in the *Sierras*, on the 4th of September, according to the resolution (*acuerdo*) of 8th March, 1631, which rescinds L. 1. tit. 1. of the *Quad.*, by which they were ordered to meet on the 8th February and 20th August. 2d, In these councils or meetings only the members (*hermanos*) of the four principal divisions, (*quadrillas*), which form this body, have votes; those are Soria, Cuença, Segovia, and Leon, L. 6. tit. 1. *del Quad.* To this council belongs exclusive jurisdiction in all matters relating to the Mesta, which its judges and *alcaldes* exercise, without the ordinary judges, chanceries, or audiencias being able to interfere with or prevent its exercise, not even in a question as to its competency, which is referred to the council for its determination, *Priv.* 39. tit. 52. § 4. 4th, The affairs of the Mesta, with the exception of the election to offices, are

<sup>23</sup> For an account of the *Mesta* and its privileges, the reader is referred to the translation of *Laborde's View of Spain*, 4th vol. p. 19. and 51, &c.

<sup>24</sup> "Judges who decide all questions relative to all the violations of the privileges annexed to the *Mesta*. The number is twelve, who are justices in eyre, forming an itinerant court."—*Laborde's View of Spain*, Translation, 4th vol. p. 140. note f.

determined by sixteen attorneys or agents, (*apoderados*), of whom each division (*quadrilla*) names four, or more, if it should appear fit to the council, L. 24. tit. 1. *del Quad.* 5th, Each division (*quadrilla*) also elects four members, one as an accountant, another as a super-accountant, (*sobre contador*), another as an alcalde, or judge of appeal; and as procurador fiscal, or attorney-general, each appoints three, who are qualified to possess two hundred head of sheep, Ll. 4, 5, and 6. tit. 2. *del Quad.* These ordinary alcaldes have jurisdiction, in civil cases, between the members during the period of the council, L. 1. tit. 12. *del Quad.* 6th, There are also alcaldes of divisions, (*quadrillas*), who are named by a plurality of votes by the subaltern divisions, (*quadrillas*), or junctions of graziers of certain towns. Their office continues four years. Some are for the level, and others for the mountainous lands. Their number is limited to one for every ten leagues, (*leguas*); and they take cognisance of the causes which arise between the members of the Mesta and their servants relating to the meeting, (*á cabaña real*), and the flocks. And if the members are present, (*estantes*), they only have cognisance of the three cases, relating to the holding meetings, (*hacer mestas*), the appointing lands for sick flocks, and deciding questions of abandonment of possession among the members of the Mesta, (*despojos de posesiones*). The alcaldes of the mountains (*de sierra*) have not so limited a jurisdiction.—See tit. 5. *del Quad.* and L. 3. tit. 14. lib. 3. Rec. [L. 4. tit. 27. lib. 7. Nov. Rec.] From the sentence or judgment of these alcaldes of division, an appeal lies to the alcaldes of appeals, (*de alzadas*), of whom there are eight, two for each principal division, (*quadrilla*), before whom all allegations and proofs must be made and had, in order that the alcaldes of appeal, (*de apelaciones*), who determine processes of this nature, may not be detained, Ll. 1. and 3. tit. 10., and L. 1. tit. 11. *del Quad.*

7th, There are also alcaldes, (*entregadores*),<sup>25</sup> whose institution is for the protection of the flocks and shepherds of the Mesta, (*cabaña*), to redress injuries, and to preserve the sheep walks and passages, tit. 52. § 9. *del Quad.*, and L. 4. tit. 14. lib. 3. Rec.; [L. 5. tit. 27. lib. 7. Nov. Rec.;] the first section of which law limits their number to four, who, according to the royal cedula of 10th July, 1721,<sup>26</sup> ought to be appointed upon the proposal or advice of the chamber, (*camara*.) They have no jurisdiction over members, (*hermanos*), nor ought they to entertain demands or suits, but in the cases excepted by L. 21. tit. 1. and L. 26. tit. 6. *del Quad.*; but they have cognisance of all the new imposts respecting the flocks of the Mesta, L. 4. § 20. tit. 14. lib. 3. Rec. [L. 5. tit. 27. lib. 7. Nov. Rec.] respecting the approvement or conversion of the pastures (*dehesas*) into arable lands, same law, § 27, and against those who shall be in possession of strayed (*mostrencos*)

<sup>25</sup> See note 24 *ante*.

<sup>26</sup> Not inserted in the Chronological Index to the *Nov. Rec.*; but see note 7. tit. 27. lib. 7. Nov. Rec.

flocks, § 30. same law. 8th, Finally, the fiscal of the council is the person who is charged (*se informa*) with the fulfilment of these duties, L. 1. tit. 4. *del Quad.*, and all of them must perform *residencia*<sup>27</sup> before the president, L. 1. § 4. tit. 14. lib. 3. Rec., [L. 2. §. 4. tit. 27. lib. 7. Nov. Rec.,] who by *cédula* of the 11th January, 1500,<sup>28</sup> it is commanded by the Catholic kings, shall be a minister of the council of Castile, § 5. *del Cop.*, 1. *del Quad.* With regard to the other offices, see tit. 1. *del Quad.*

§ 10. In order to form some idea of the right which the members of the Mesta possess, with respect to the pastures (*dehesas*) where their flocks are to graze, it is necessary to observe, 1st, That for the conservation of these pastures, it is ordered that they be not purchased for the purpose of being cultivated, L. 4. tit. 8. *del Quad.* 2d, That the members of the Mesta acquired possession of them or the commons (*6 en los pastos comunes*), by grazing their cattle in them for a winter or summer, or putting a value on them which they do not forfeit but by the loss or failure of their flocks, or for other causes which are mentioned in the 6th. tit. *del Quad.* Ll. 1. 2. and 23. tit. 6. *del Quad.* But he who shall hire pastures (*dehesas*) only at the rate of so much a-head for stock (*por cabezas*), does not acquire possession, L. 13. tit. 6. *del Quad.* nor the shepherd against his master, L. 14. tit. 6. *del Quad.* 3d, That no one can bid for any one of these pastures (*dehesas*), which may be possessed by a member of the Mesta (*hermano*), L. 15. tit. 6. *del Quad.* 4th, The owners of pastures (*dehesas*) cannot stock with their own cattle more pasture than the necessary quantity, and a third besides; and if they should change the feeding-ground the surplus shall remain for the cattle keeper who has acquired possession (*posesionero*), *Céd. de 7. de Abril de 1674.*<sup>29</sup> 5th, If the owner and the cattle keeper are not agreed upon the price, each shall name an appraiser; and if they disagree, the justice in whose jurisdiction the pasture is, names a third; and if the owner have the jurisdiction the nomination devolves upon the judge of the nearest royal place, but never on the justice of the place of which the owner is a native, L. 3. § 3. tit. 14. lib. 3. Rec. [L. 4. tit. 27. lib. 7. Nov. Rec.] For fuller information reference may be had to the *ediciones* to tit. 6. *of the Quad.* and to what is said respecting pastures.

§ 11. With respect to what relates to the flocks of the Mesta it is laid down, 1st, That those of the kingdom of Castile are of the *cabaña real*, which is under the protection of his majesty, *Priv. 2.* so that no corporation or community (*comunidad*) can form [ 82 ] another association (*cabaña*), nor any sheep owner separate himself from the royal one, L. 11. tit. 27. lib. 9. Rec. [L. 1. tit. 27. lib. 7. Nov. Rec.] 2d, They do not pay ferryage nor pontage, *Priv. 42.* 3d, The

<sup>27</sup> The account which judges or official persons were called upon to render, in Spain, on the expiration of their office or appointment, of their conduct during its exercise or administration.

<sup>28</sup> Not inserted in the Chronological Index of the Nov. Rec.

lost flocks which are called strayed (*mostrencos*) are the council's of the Mesta by privilege, and the declaration of the commissaries of the *crusade*, *Priv.* 28. § 2. and 7. and L. 4. § 30. tit. 14. lib. 3. Rec. [L. 5. tit. 27. lib. 7. Nov. Rec.] 4th, This *cabaña real* includes the kinds of woolly (*lanar*) flocks, goats, cows, mares, colts, and hogs, *Priv.* 20. 5th, These same privileges belonging to the *cabaña real* were extended to the city and corporation of *Albarracin*, by *Cedula* of 16th December, 1693.<sup>20</sup>

§ 12. The flocks generally are distinguished into those which are migratory (*transhumantes*), those which traverse the limits of their pasture (*travesios*), and stationary (*estantes*). The migratory flocks are those which traverse the royal pass (*puerto*) to go to feed where they paid the toll *de montazgo*,<sup>21</sup> the docket of which is set forth in tit. 17. *del Quad.*, but hath been done away with by *Cedula* of 17th July, 1758;<sup>22</sup> as an equivalent for it, a duty was established on the exportation (*de extraccion*) of wool from the kingdom. These flocks may travel freely through all the commons (*terminos*) to graze and drink water, provided they do no injury to the corn (*panes*), the vineyards and gardens, nor to the meadows which are mowed annually (*prados de guadaña*) in the pastures inclosed and marked out for oxen (*dehesas de buyes coleadas y autenticas*), *Priv.* 21.; and if they should do damage, it shall be paid for according to the estimation of two honest men, but without their being ill-treated, *Priv.* 21. and 57. § 2. It is to be observed that no penalty can be exacted for grazing flocks in the waste lands (*baldios*), and pastures for oxen, L. 14. tit. 23. *del Quad.*

The flocks *travesios* leave their pastures, and on the contrary those called *estantes* remain in them. The mode by which the flocks must travel through the sheep walks, passes, and over the bridges, and from one pasture (*dehesa*) to another, is explained by tit. 20. and 42. and L. 14. § 6. and 22. tit. 14. lib. 3. Rec.<sup>23</sup> These descriptions of flocks, 1st, Must be wandering, and marked as prescribed by L. 1. tit. 39. *del Quad.* 2d, They are prohibited from being carried out of the kingdom, L. 21.<sup>24</sup> 23. and 24. tit. 18. lib. 6. Rec. [L. 1. and 2. tit. 15. lib. 9. Nov. Rec.] 3d, They cannot be sold without having been held in possession four months before, *Priv.* 10. § 2. 4th, They may enter the kingdoms of Aragon, Valencia, and Navarre to graze, without paying fees, *Priv.* 29.; and into Portugal, on giving security to bring back the same flocks, *Priv.* 29. § 5. L. 22. tit. 18. lib. 5. Rec.<sup>25</sup> [ 83 ] 5th, The number of sheep to feed on the commons cannot be limited by the laws (*estatutos*) of the municipalities (*pueblos*) to the prejudice of the members of the *Mesta*, L. 10. tit. 24. *del Quad.*, nor can the sheep of the flock (*cabaña*) be obstructed in respect of their

<sup>20</sup> Not inserted in the Chronological Index to the *Nov. Rec.*

<sup>21</sup> Toll or duty paid in favor of the crown of Spain, for the passing of flocks from one province to the other.

<sup>22</sup> Not inserted in the Chronological Index to the *Nov. Rec.*

<sup>23</sup> Not noticed in *Nov. Rec.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

commons by new plantations of woods (*de montes*), *Priv.* de 29th April, 1526. 6th, For the sick flocks, a separate piece of ground shall be set aside, tit. 21. *del Quad.* 7th, And from each flock sixty head may be sold without paying the toll (*portazgo*). For a complete knowledge of this subject, it is necessary to inspect the *Quaderno*, and tit. 14. lib. 3. Rec. [Tit. 27. and 25. lib. 7. Nov. Rec.]

§ 13. Among the things destined for the benefit of a corporation, we ought to place its funds or property, and the taxes raised on the inhabitants (*los propios y arbitrios de los pueblos*), arising from various productions;<sup>35</sup> and we, therefore, according to our laws, will consider them in what regards their constitution, administration, and end.

§ 14. To their constitution belongs, 1st, That the suits with respect to the *propios* and rents of the corporation shall be determined summarily; and two sentences confirmatory of each other shall be carried into execution, without an inhibition being allowed to ascertain if there be ground for an appeal, L. 5. tit. 5. lib. 7. Rec. [L. 3. tit. 16. lib. 7. Nov. Rec.] 2d, That the cities, towns, and places, shall not be dispossessed of their commons (*terminos*), without being heard, L. 6. tit. 5. lib. 7. Rec. [L. 1. tit. 21. lib. 7. Nov. Rec.] 3d, That the *regidores* shall not obstruct the corporation in the prosecution of suits with respect to *propios*, L. 7. tit. 5. lib. 7. Rec. [L. 3. tit. 21. lib. 7. Nov. Rec.] 4th, That judges shall not be appointed to sell the public commons and waste lands, L. 8. and 10. tit. 5. lib. 7. Rec. [L. 1. tit. 23. lib. 7. Nov. Rec.] 5th, That the waste lands, trees, and their fruits, shall not be sold by the king, unless it be for the benefit of his subjects (*vasallos*), L. 11. tit. 5. lib. 7. Rec. [L. 2. tit. 23. lib. 7. Nov. Rec.] 6th, That the price for the grazing on the pastures which were broken up before the year 1748, shall partake of the quality of *propios*, *Ced. of 13th January, 1749.*<sup>36</sup> 7th, That the cognisance of *propios* belongs to the council of Castille, *Decret. 12th May, 1762.* 8th, That duties or taxes (*arbitrios*) cannot be imposed, either in Aragon or Castille, without the royal authority, *Ced. 21st June, 1760.*<sup>37</sup> 9th, That duties *de milicias*, and the tribute money in acknowledgment of seignory (*moneda forera*), ceased in 1724, *Aut.* 25. tit. 9. lib. 3. Rec.<sup>38</sup>

§ 15. The great prejudices which have resulted to the towns, or corporations, from the improper administration of their "*propios*," have induced the necessity of enacting very proper regulations [ 84 ] for its government: those which the vigilance of our Catholic King Charles the III. published in the years of his happy reign, which may God multiply for the good of the monarchy, occupying at present the principal place. Among these is now in force the instruction of 30th

<sup>35</sup> *Palacios* says, that the *propios* consist of rents or property (*fundos*) belonging to the towns; and the *arbitrios*, of certain imposts on provisions (*abastos*) or marketable goods.

<sup>36</sup> Not inserted in the Chronological Index to the *Nov. Rec.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Not in *Nov. Rec.*



July, 1760.<sup>39</sup> By it there was created in every town an assembly or junta, (*junta de propios y arbitrios*), composed of the superintendant and two regidores of the cabildo, (*ayuntamiento*); and it was ordered on the 24th of July, 1762, that all the ancient *juntas de censalistas*<sup>40</sup> of the kingdom of Aragon should transmit to the former their resolutions, (*concordias*), and papers: at this *junta*, a deputy from the *censalistas* may assist, remaining responsible, as all the other individuals for the employment of the funds (*caudales*) of the "*propios*," *Ced.* 18th October, 1764.<sup>41</sup>

This *junta*, 1st, ought to transmit its annual accounts to the council of superintendence of the province; the formulary of which was transmitted to the towns or municipalities (*á los pueblos*) in the *Ced.* of 29th March, 1764,<sup>42</sup> and was commanded to be observed by the order of the 16th March, 1765.<sup>43</sup> 2d, It ought to rent each separate *propio* to the highest bidder at public outcry, according to the direction of L. 4. tit. 5. lib. 7. Rec. [L. 4. tit. 16. lib. 7. Nov. Rec.], the justices, regidores, or other officers of the corporation not being allowed to rent them, L. 3. tit. 5. lib. 7. Rec. [L. 7. tit. 9. lib. 7. Nov. Rec.], nor powerful persons, L. 23. tit. 6. lib. 3. Rec. [L. 7. tit. 16. lib. 7. Nov. Rec.] 3d, The regidores, jurats, and escribanos, must not borrow from the stewards (*muyordomos*) of the *propios* and of the public granaries, nor from the renters of them, under pain of loss of office, Aut. 5. tit. 4. lib. 3. Rec.<sup>44</sup> Licenses to raise money or taxes (*tomar censos*) upon the *propios* cannot be applied for without expressing those to which they are subject. 5th, The cabildos (*ayuntamientos*) ought to administer the *propios*, *arbitrios*, and municipal taxes (*sisas*) without applying them to their own purposes, *Decre.* of 18th June and 14th July, 1751.<sup>45</sup>

§ 16. The object of this property is to satisfy from its produce the burthens imposed upon the corporation. Wherefore it should be known, 1st, That the towns which may not have sufficient *propios* shall point out to the corporation those which may appear the most [ 85 ] suitable objects of revenue, *Céd.* 9 October 1765.<sup>46</sup> 2d, That from the produce of the *propios* the king exacts the two *per cent.* for the expense "*de cuenta y razon*," which must be paid by thirds (*tercios*) and in preference to every other expense. 3d, After which shall be paid the expenses for administration, public works, holy days, proclamations, funerals of royal persons, the destruction of the locust (*matanza de la langosta*), the provision of the public granary, its own funds not being sufficient for the purpose, the salaries of physicians, surgeons, veterinarians, public assayers, masters, &c.; and the

<sup>39</sup> L. 13. tit. 16. lib. 7. Nov. Rec.

<sup>40</sup> Perhaps "annuitants" may be the suitable translation.

<sup>41</sup> Not inserted in the Chronological Index to the *Nov. Rec.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Not noticed in *Nov. Rec.*

<sup>45</sup> Not inserted in the Chronological Index to the *Nov. Rec.*

<sup>46</sup> *Ibid.*

houses of the royal granaries shall be repaired, and the breeds of horses kept up; all which is better explained by the before mentioned instruction of 1760. 4th, By two *Cédulas* of 1766, it was ordered, that from the products of the *propios* the municipalities (*pueblos*) may go on collecting the taxes or duties which shall be due by them for one year, and in the other may pay the pensions in arrear (*pensiones atrasadas*) and so on successively. 5th, With respect to the assessments (*repartimientos*), of which tit 6. lib. 7. Rec. [tit. 22. lib. 6. Nov. Rec.] speaks, reference must be had to the *Cédulas* of 1751, which have fixed them with respect to matters in dispute appertaining to the *propios*: frequent doubts may occur whether they ought to be discussed in the audiencias or in the tribunals of the intendants, upon which it would be proper some declaration should be made.

§ 17. The public granaries (*positos*), which by their nature ought to be considered as public things, must be governed and administered according to the instruction of the 30th May, 1753,<sup>47</sup> which explains and amends, L. 9. tit. 5. lib. 7. Rec., [L. 1. tit. 20. lib. 7. Nov. Rec.] which proves to us that granaries were already established in 1584. Thus we know, 1st, That the granaries are, some for the supply of the town, and others for assisting the laborers. 2d, That they are governed by the magistrates of each town, a judge, escribano, syndic, and *depositario*. 3d, That applications for redress (*recursos*) and appeals from them belong to the superintendant general. 4th, That they are obliged to be present at the delivery and sharing out of the grain; at the passing the accounts; at the general measuring of the stock (*fondos*), which is done at the end of June in every year; at the winnowing of the corn (*apaleos*), in order that the additional quantity to be paid in by the farmers (*creces*) may not be concealed; and at the inspection of memorials, at which two experienced laborers ought to be present to examine whether what each person sets forth as to the quantity of corn that will be necessary for his cultivation (*labores*) is correct; which division is usually made in October, [ 86 ] an edict or notice being published fifteen days previously to present these memorials to the junta. 5th, This corn ought to be in a secure place locked up under three keys of different locks, of which one must be in the possession of the justice, one of the mediating (*intervenlor*) *regidor*, and another in that of the *depositario*. 6th, The master keys (*sus caudales*) must be in the archives or chest of the cabildos, and, if there be none, in the public granary, or in the possession of the *depositario*, he giving security. 7th, Four books must be kept, one to insert the entries of grain, and the existing quantity of corn; another for inserting the issues of corn, and the other two to enter the money which is delivered or paid in and issued out. 8th, The orders in virtue of which the grain is delivered or taken out must be signed by the mediating judge (*interventor*), and escribano, the laborers giving security for what they take out. 9th, At the end of

<sup>47</sup> Vide note 24. tit. 20. lib. 7. Nov. Rec.

June the *depositario* presents his accounts, which must be passed to the syndic, in order that he may investigate them (*ponga reparis*); and if he should not find them correct he is to state that they ought not to be approved, and the judge shall determine (*substanciara*) upon it. 10th, When the granary is repaid what it advanced to the *laborers* or to the public, information of it is given to the judge of the district (*partido*), who ought to transmit it to the superintendant general with the accounts of each granary. 11th, The *depositario* is entitled for his trouble at the rate of a *maravedi* for each *funega* which is received or issued, the syndic the same for what is received, and also the *escribano*; and the judge a *half maravedi* for what is received or issued out.

Cap. 7. Private things are those which belong in particular to every individual of which he may acquire or lose the dominion, L. 2. tit. 28. P. 3. [L. 2. tit. 28. P. 3.]

Cap. 8. The second division of things is into corporeal and incorporeal. The first are those things which may be seen and touched, and are divided into movable and immovable. Things called movable (*muebles*) are all those which men can move from one place to another, and all those which can move naturally by themselves, L. 4. tit. 29. P. 3. [L. 4. tit. 29. P. 3.] Things immovable (*sitias*) are those which can neither be moved by men, nor by themselves naturally. Things incorporeal are those which can be neither seen nor touched; of this kind are all species of rights (*de derecho*) of which [ 87 ] our jurisprudence treats, and which have their proper places in the following titles.

Cap. 9. A right is either in the thing, or to the thing; a right in the thing is that which belongs to one over any thing without respect to another person; a right to a thing is that which belongs to any as against another person to oblige him to give or to do something: of the first kind are right of dominion, of inheritance, services (*servidumbres*), and pledge, and mortgage. Possession, as it is a momentaneous right, and is lost by the loss of the thing, is not a right in the thing. Of the second kind are all species of obligations which arise from contracts.

## TITLE II.

## OF DOMINION, THE MODES OF ACQUIRING IT, AND ITS KINDS.

CAP. 1. THE first species of right in the thing is that of domi- [ 89 ] nion, which is a power that arises from the right every one has in the thing, by reason of which he may dispose of and derive from it every possible advantage, may exclude others from its use, and claim it (*vindicarla*) from any possessor, unless a contract, or the law, hinder it. It is from this inferred, that there are two kinds of dominion, one absolute or perfect, which consists both of the power of disposing of, and receiving the profit (*utilidad*); the other qualified, or less perfect, by which these two rights are divided between the direct or immediate proprietor, who may dispose of the thing; and the useful usufructuary (*util*) proprietor, who has the power of claiming (*vindicarla*), and of enjoying the use or profits of it. Of this last class are the feud or fee (*feudo*), and the *enfiteusis* (lease), which we proceed to explain before entering on the exposition of the modes of acquiring dominion.

Cap. 2. Feud<sup>1</sup> is a grant which the lord makes to any man on condition that he becomes his vassal, and does him homage to be faithful to him, L. 1. tit. 26. P. 4. [L. 1. tit. 26. P. 4.] The origin of feuds must be ascribed to the ancient Franks or Germans; for it appears that their kings were accustomed to grant lands to their generals and nobles (*señores*), on the condition of their doing homage and performing military service; from them the Lombards adopted them, who introduced them into Italy in the sixth century, *Jorge Adam Struvio*, *Syntagma Juris Feudalis*, Cap. 1. § 3. Feuds were not known in Spain until the ninth century; and the first notice that is taken of them is by the Emperor Charles the Bald having granted in [ 90 ] fee Barcelona to Wifredo II. the Handsome (*beloso*), *Diago*, *Hist. de los Condes de Barcelona*, lib. 2. cap. 7. From Catalonia it is to be supposed that feuds would be introduced into Castille; and, in truth, the *Behetrías*,<sup>2</sup> such as they are described by *Pedro Lopez de*

<sup>1</sup> A feud, says *Palacios*, is a particular species of contract like, in part, to the *Emphyteusis*, in which the sovereign or lord grants to one the *dominium utile* to a thing or property, real or honorable, on the promise, by the latter, of fealty, and some personal service by him and his successors: that its origin must be attributed to those who sallied from the north to conquer the empire.

<sup>2</sup> *Behetrías*, or *benefactorías*, from *benefactoria*: towns, the inhabitants of which were invested with the right of choosing their own lord or señor. *Behetría* was one of the ancient kinds of seignory in Spain: for its further definition and its origin, as well as of the other kind of seignory called *dominio solariego*, mentioned in the text, the reader, who may be desirous of more information on the subject, is referred, in addition to the author there cited, to Law 3. tit. 25. P. 4. L. 2. and tit. 1. lib. 6. Nov. Rec. *Cornejo Diccionario del derecho real de España*, vol. 1. word *Behetría*: and to *Teatro de la Legislacion Universal de España é Indias*, 5th vol. same word.

*Ayala* in his *Crón del Rey Don Pedro*, Año. 2. cap. 14., and the *dominio solariego* partook much of the nature of feuds; to which were annexed homage and military service, until the duty paid in lieu of military service (*lanza*) and the *annats* of the half year (*media annata*),<sup>3</sup> were introduced as equivalent to them. This is confirmed by L. 68. tit. 18. P. 3. [L. 68. tit. 18. P. 3.] which referring to the solemnities of investiture, says, that the *grandees* (*ricos homes*) granted feuds; and that there existed feuds, strictly so called, in Castille, is proved by tit. 26. P. 4. [tit. 26. P. 4.]; the laws of which upon the constitution, dissolution, and recognition, or acknowledgment of the feud, and the obligations of the feudatory, agree with the feudal laws of the Lombards contained in the *Consuetudines Feudorum*. We only observe one remarkable difference in point of succession or descent; for L. 6. tit. 26. P. 4. [L. 6. tit. 26. P. 4.] says, that the succession does not descend beyond grandsons, but returns to the lord; and it is clear, that, by the feudal common law, the succession was extended *in infinitum*; but this gives us to understand, that such a law, enactment, or provision, was made in favor of lords, to afford them, by this mean, the greater liberty of disposal. See tit. 25 P. 4. [tit. 25. P. 4.], upon the reciprocal obligations of vassals and lords, and the cases in which the former might abandon the feudal dominion (*señoría*) of the latter.

Cap. 3. L. 5. tit. 30. P. 3.<sup>4</sup> makes a clear distinction between the feud, usufruct, and emphyteusis.<sup>5</sup> The last is a contract or agreement which is made respecting real property granted for the whole life of the tenant, or his heirs, on condition of the payment of an annual rent, or as shall be agreed on, L. 28 tit. 8. P. 5. [L. 28. tit. 8. P. 5.]. Whence it follows, 1st, That it is a contract partly between sale and lease, L. 3. tit. 14. P. 1. [L. 3. tit. 14. P. 1.]. 2d, That the terms set forth in the deed, must be fulfilled, L. 28. tit. 8. P. 5. [L. 28. tit. 8. P. 5.]. 3d, That if the thing or property be lost or destroyed by fire, earthquake or inundation, the tenant (*enfiteuta*) shall not be obliged, from that time forward, to pay the rent (*pension*); but if the whole be not destroyed, so that there should remain at least an [ 91 ] eighth part, he shall be obliged to pay, L. 28. tit. 8. P. 5. [L. 8. tit. 28. P. 5.]. 4th, If the tenant hath allowed three years to go by without paying the rent to a lay lord, the property becomes forfeited (*cae en comiso*), without its being necessary to have recourse to the authority of the judge; provided, however, that if within ten days after the expiration of the above time, he should wish to pay the rent, the lord must allow him to retain the thing or

<sup>3</sup> *Palacios* says, *lanzas* consist of a certain service in money, which the *grandees* and nobles pay to the king every year, and *media annata*, the sum which is paid for the title and honor (*per el título y honorífico*).

<sup>4</sup> L. 5. tit. 30. P. 5., is cited in the text; but there is no such title in the 5th Part., and the 3d Part. is supposed to be meant.

<sup>5</sup> See *Wood's Inst. C. L.*, p. 238, book 3. c. 5., for the definition, &c. of this contract, also *Hal. Annal. C. L.* p. 3. ch. 18.; 1 *Browne. C. L.* p. 192. n. 7. Book 2. ch. 3.

property, L. 28. tit. 8. P. 5. [L. 28. tit. 8. P. 5.] 5th, That if the direct or immediate lord be an ecclesiastic, an omission to pay the rent for two years is sufficient to work the forfeiture of the property, L. 28. tit. 8. P. 5. [L. 28. tit. 8. P. 5.] 6th, That the tenant may alienate the land, acquainting the lord who has the right of pre-emption (*tanleo*), with the price that another has offered; and he not giving that price, or being silent with respect thereto, for two months, the tenant may sell, but to a person from whom the lord may recover the rent, in order that he shall execute a new deed of lease, and for which he is entitled to a relief (*laudemio*),<sup>6</sup> which is the fiftieth part of the price or value, L. 29. tit. 8. P. 5. [L. 29. tit. 8. P. 5.] 7th, That by alienating is understood selling, exchanging, pledging, or mortgaging, imposing services, or assigning to one, without such power of alienation, L. 10. tit. 23. P. 7 [L. 10. tit. 23. P. 7.] And thus the tenant (*el enfiteuta*) shall be able to rent the land or thing, notwithstanding *Lopez, á* L. 29. tit. 23. P. 7. Gl. 3. says the contrary.<sup>7</sup> 8th, That if a sale thereof was made without the permission of the lord, and he knew and consented to it, no forfeiture is incurred, *Lopez, á* L. 29. tit. 8. P. 5. Gl. 6. Quæst. 4.

Cap. 4. The modes of acquiring full or absolute dominion are either by the laws of nations, or by the civil or municipal law. The natural modes are original or derivative. The first are so called, because by them that thing which was not in the power or possession of another, commences to be under the dominion of some one, and derivative modes are so called, because by them the dominion is transferred from one to another. Of the original some put us in possession of (*entregan*) the body or substance of the thing, as occupancy or *invention*; others produce a certain augmentation to the thing already ours, such does accession. Tradition or delivery (*entrega*) is the derivative mode.

Cap. 5. Occupancy is the taking coporeal things which do not belong to another, with the intention of retaining them for one's self. Things are said to be no one's property, which, by their nature, are not under the dominion of any one, or were thrown away by the owner, with the intention of parting with them in future, Ll. 49. and 50. tit. 28. P. 3. [Ll. 49. and 50. tit. 28. P. 3.]

Hence it arises, 1st, That wild beasts, birds, and fishes, [ 92 ] immediately upon being taken, are the property of him who takes them, [L. 17. tit. 28. P. 3.; [L. 17. tit. 28. P. 3.]; and they can be taken not only on one's own property, but on that of another person, unless the owner forbid, or do not permit the entry thereon, Ll. 17. and 22. tit. 28. P. 3. [Ll. 17. and 22. tit. 28. P. 3.] 2d, That bees gathered in hives cannot be taken; because he who has them in hives, has already made them his own, L. 22. tit. 28. P. 3., [L. 22. tit. 28. P. 3.,] unless they have flown from the hive, so that the

<sup>6</sup> See Wood's Inst. Civ. Law, lib. 3. C. 5. P. 239.

<sup>7</sup> It does not so appear. Vide the reference in the text.

owner is unable to see or to take them, L. 22. tit. 28. P. 3. [L. 22. tit. 28. P. 3.] 3d, For the same reason, no one can take domestic animals, such as hens, capons, &c., L. 24. tit. 28. P. 3. [L. 24. tit. 28. P. 3.] 4th, That if beasts wild by nature, although domesticated, fly away, and lose the habit or *animus* of returning, they shall belong to the first taker, L. 23. tit. 28. P. 3. [L. 23. tit. 28. P. 3.] 5th, That it is not sufficient to wound the game, but it is necessary to seize or lay hold of it,<sup>8</sup> in order to acquire the dominion, L. 21. tit. 28. P. 3. [L. 21. tit. 28. P. 3.]

The liberty of fishing and hunting is limited or restrained by the laws of the kingdom for the public benefit. The latest ordinance (*pragmatica*) of 3d March, 1769,<sup>9</sup> subsequent to that of tit. 8. lib. 7. Rec., and other *cedulas* or orders issued upon the same point, contains and explains fully every thing connected with this subject, and, therefore, in the desire to conform to it as a suppletory law, and to confine ourselves within the limit of our institute, we have to observe. 1st, That it prohibits fishing and hunting from the beginning of March to the end of July, and in the remaining months, on snowy or tempestuous days, (*días de nieve ó de fortuna*). 2d, That during the period forbidden, fowling is also prohibited except for the purpose of killing sparrows; and the use of instruments of fishing, except the hook and nets with meshes. 3d, That it is not allowed to use quick lime for fishing, nor poison, nor other prejudicial things. 4th, That it declares, that no hunters by profession shall be permitted, as being an idle set of persons. 5th, That wild bulls, (*urones*), decoy birds, snares, traps, and other unlawful instruments are for ever prohibited. 6th, That only nobles, and persons of property and of distinction, may employ greyhounds, with permission of the council, which is restricted to the time the vintage is finished, until the month of March. 7th, That the owners or renters of thickets (*sotos*) and [ 93 ] pasture-grounds (*colos*) may begin their hunting from St. John the Baptist's day. 8th, That the penalty for transgressors, if nobles, is the loss of the instruments, twenty thousand maravedis fine, and two years' military service for the first offence; for the second, double the fine; and for the third, triple. If plebeians, they are condemned to the loss of the instruments, ten thousand maravedis fine, and two years' banishment for the first offence; for the second, the fine is doubled; and for the third, they shall pay twenty thousand maravedis, and suffer four years' imprisonment, (*de presidio*). 9th, That the intendants, corregidores, and justices shall take cognisance of these causes in the first instance, no person of whatever class being

<sup>8</sup> And this effectually; for it appears by the law referred to in the text, that if game be caught in snares set by one, yet it shall be the first taker's, notwithstanding he be not the setter or owner of the snares or traps; unless a custom to the contrary should be in force. *Query*, if the land on which the snare was set belonged also to the owner of the snare.

<sup>9</sup> See *Nota* 5. tit. 30. lib. 7. Nov. Rec.: the last regulations on this subject, it is believed, are contained in L. 11. tit. 30. Lib. 7. Nov. Rec., which see.

excepted from their jurisdiction, with respect to matters relating to fishing and hunting.

Cap. 6. Invention or finding, is the mode by which we acquire the dominion of things which have no owner by their nature, or which have been relinquished by them, with the intention or *cum animo* of not returning to take them, such as gold, pearls, and precious stones, which are met with on the sea-shore, which, by the law of nature, belong to the first occupant, L. 5. tit. 28. P. 3., [L. 5. tit. 28. P. 3.,] as also money thrown to the people on days of public rejoicing, and other holidays, L. 48. tit. 28. P. 3. [L. 48. tit. 28. P. 3.]

With this class should be joined strayed goods, (*mostrencos*); that is, *which have lost the owner*; but in Spain they are not considered as such, because they belong to the crown, (*real camara*), and the cognisance of them appertains to the ordinary justices, and not, as was formerly the case, to the sub-delegates of the *cruzade*, according to the last provision of 9th October, 1766,<sup>10</sup> which, without doubt, annuls the former laws which treated of *mostrencos*, and particularly aut. un. tit. 9. lib. 1. Rec.<sup>11</sup>

Mines of gold, silver, quicksilver, &c., ponds of salt, and other salt pits belong also to the royal patrimony, Ll. 2. and 4. tit. 13. lib. 6. Rec., and L. 19. tit. 8. lib. 9. Rec. [Ll. 1. and 3. tit. 18. lib. 9., L. 1. tit. 19. lib. 9. Nov. Rec.] Wherefore Philip II., by an ordinance of 1584, which is L. 9. tit. 13. lib. 6. Rec., [L. 4. tit. 18. lib. 9. Nov. Rec.,] grants permission to his native subjects, and to foreigners, to work and improve mines, and concedes various rewards (*mercedes*) and privileges to the discoverers of them, ordering that care should be taken not to do any injury to the estates of individuals; and that there be paid to the king the fifth<sup>12</sup> of the product and other [ 94 ] duties therein expressed: and he renews L. 4. tit. 13. lib. 6. Rec., and L. 5. tit. 13. lib. 6. Rec.,<sup>13</sup> [L. 3. tit. 18. and Nota 1. tit. 20. lib. 9. Nov. Rec.,] in as far as they are not contrary thereto. This law hath been limited in some things by L. 10. tit. 13. lib. 6. Rec. [Nota 1. and 2. tit. 18. lib. 9. Nov. Rec.]

The treasure which is found upon the earth or concealed in it by any one, is applied to the benefit of the Exchequer, (*al fisco*), with a reservation of the fourth part for the finder, who ought to communicate the discovery to the justice, L. 1. tit. 13. lib. 6. Rec., [L. 3.

<sup>10</sup> N. 1. tit. 22. lib. 10. Nov. Rec.

<sup>11</sup> Nota 2. tit. 3. lib. 10. Nov. Rec.: but a year and two months were allowed for the owner to reclaim his goods after their delivery to the justice or *alcalde*, as directed by Ll. 1, 2, and 4. tit. 22. lib. 10. Nov. Rec.: during which time, the finder or person asserting his privilege to the *bienes mostrencos*, was to cause them to be publicly proclaimed once a month, on a market day, in order to afford the owner the opportunity to claim restitution of his property.

<sup>12</sup> See the Law 4. tit. 18. lib. 9. Nov. Rec., referred to in the text: and *notas* 1. and 2. *ibid.*

<sup>13</sup> See *Nota a. L. 3. tit. 18. lib. 9. Nov. Rec.*



tit. 22. lib. 10. Nov. Rec.,] which alters L. 45. tit. 28. P. 3. [L. 45. tit. 28. P. 3.] See *Lagunez de fruct.* part. 1. cap. 11.

Cap. 7. The other natural original mode is accession, or the right of acquiring the augmentation or improvement which any thing belonging to us receives. It is divided into that caused by nature, and that produced by industry. The natural kinds of accession are, 1st, The young of animals which belong to those whose property the females are, L. 25. tit. 28. P. 3.<sup>14</sup> [L. 25. tit. 28. P. 3.] 2d, The island that rises in a river which belongs proportionally to the estates which border on the bank to which it is nearest or most immediate, Ll. 27, 28, and 29. tit. 28. P. 3. [Ll. 27, 28, and 29. tit. 28. P. 3.] 3d, The increase which rivers cause by degrees to an estate, will belong to the proprietor of it; but not that caused by a sudden overflow, L. 26. tit. 28. P. 3. [L. 26. tit. 28. P. 3.] 4th, The land which is left dry by the change of the current of a river, is divided between the owners of the estates on that bank; and the proprietors on the bank where it takes its new course, lose the dominion of the land so engrossed, and the new course assumes the nature of the first or original channel, L. 31. tit. 28. P. 3. [L. 31. tit. 28. P. 3.] But if lands should remain covered by an inundation, the proprietors shall not lose the dominion, L. 32. tit. 28. P. 3. [L. 32. tit. 28. P. 3.] 5th, If a tree planted on one estate should extend its principal roots<sup>15</sup> to the land of another, the owner of the latter shall also be the owner of its fruit; and if it throws out principal roots in both, the proprietors of both the estates shall equally divide its fruit, L. 43. tit. 28. P. 3. [L. 43. tit. 28. P. 3.]

Cap. 8. To industrial accession belongs the union or addition of another person's property to one's own, *ex. gr.* a foot to a statue of the same metal; the writing to the paper; a tablet to the painting; and a house to the soil. In these cases, the accessory or addition belongs to the owner of the principal; the foot, in respect of the [ 95 ] statue, the writing in respect of the paper, the tablet in respect of the painting, the buildings and fruits in respect of the *land* on which they were planted or sown, and the materials in respect of the building, being considered as accessories; but he who united or added another's property with or to his own, or worked on it with good faith,<sup>16</sup> (*con buena fe*,) shall be entitled to remuneration for the expenses and improvements from him who acquires them by reason of the accession; and if he proceeded with bad faith, (*mala fe*,) he loses the whole, as explained with a variety of examples<sup>17</sup> by Ll. 35, 36, 37, 38, 42, and 43. tit. 28. P. 3., [Ll. 35, 36, 37, 38, 42, and

<sup>14</sup> Except, says the law quoted in conclusion, there should exist a custom in the particular place, or an agreement between the proprietors of the male and female to the contrary.

<sup>15</sup> The law quoted in the text, L. 43. tit. 28. P. 3., says, those from which it derives nourishment. There would, perhaps, be some difficulty in ascertaining this fact.

<sup>16</sup> i. e. supposing it to be his own.

<sup>17</sup> And some qualifications.

43. tit. 28. P. 3.,] which have copied all that the Roman laws say upon the subject.

A species of industrial accession is the specification or formation of a new kind of thing, with the material of another, as if from grapes wine be made, a vase from silver, &c. If the materials of which the thing is constructed cannot be reduced to their original state, they shall belong to him who made it in good faith, on paying the value of the materials to the owner. And if it be possible to reduce them to their original state, the thing shall be given to the original owner of the materials, who shall satisfy the party for the expense occasioned in forming the new thing; but in case of acting in bad faith, the workman shall lose his labor and expenses, L. 33. tit. 28. P. 3. [L. 33. tit. 28. P. 3.]

Mixtion (*mixtion*) results from the mixture of materials of one kind with those of another, and therefore he who mixes his own gold with that of another, never makes it his, although he may have done it with good faith, L. 34. tit. 28. P. 3. [L. 33. tit. 28. P. 3.] and if they should be mixed by chance or by the will of the owners, they shall be common, they being such as can be separated; and if this be not possible, each shall preserve his property in his share, L. 34. tit. 28. P. 3. [L. 34. tit. 28. P. 3.]

Cap. 9. Tradition or delivery (*tradicion*), which is the derivative mode of acquiring dominion, is made when men give possession of their property to others for some lawful reason, L. 46. tit. 28. P. 3. [L. 46. tit. 28. P. 3.] It is corporeal, as if delivery be made of the thing into the hands of him who purchases it, &c., L. 46. tit. 28. P. 3. [L. 46. tit. 28. P. 3.] and also fictitious or feigned, as in the case where one should transfer or aliene a thing which he hath lent to another, L. 47. tit. 28. P. 3. [L. 47. tit. 28. P. 3.] This takes place in respect to things corporeal as well as incorporeal; and as demonstrated by the examples referred to in Ll. 46. and 47. tit. 28. P. 3. [Ll. 46 and 47. tit. 28. P. 3.]

Symbolical tradition or delivery is when one thing is delivered in token or earnest (*señal*) of another, the dominion of which it is desired to transfer; *ex. gr.* if the keys of the granary be delivered, which contains the corn which is sold, see Ll. 6. 7. and 8. tit. 30. P. 3. [Ll. 6. 7. and 8. tit. 30. P. 3.]

Cap. 10. The modes of acquiring full dominion, according to the civil or municipal law, are prescription, donation, and other contracts of which we shall speak hereafter: we are now treating of prescription as having a very natural connection or affinity with possession, which we are to consider as accessory to dominion, although it may happen that it is sometimes found separate.

Cap. 11. Prescription is to hold the property or thing of another for a certain time, and to make it thereby one's own, so that the right owner cannot afterwards deprive you of it. To constitute prescription, good faith (*buena fe*), just title, and capacity of the thing for the purpose, and of the person who prescribes, are necessary; as also

continued or uninterrupted possession for a determinate time, L. 9. tit. 29. P. 3. [L. 9. tit. 29. P. 3.]

§ 1. Good faith consists in the possessor's believing that the person from whom he received the thing, had right to alienate or transfer it, L. 9. tit. 29. P. 3. [L. 9. tit. 29. P. 2.] and therefore there will not exist good faith, 1st, If the right owner of the thing sold warns or gives notice to the purchaser that it does not belong to the vendor, L. 10. tit. 29. P. 3. [L. 10. tit. 29. P. 3.] 2d, Nor if one purchase a thing from a minor, a madman, or the attorney of another, fraudulently or collusively inducing him to dispose of it,<sup>18</sup> L. 11. tit. 29. P. 3. [L. 11. tit. 29. P. 3.] 3d, But there will exist good faith in one who, when he receives the thing, believes the person from whom he makes the purchase to be the right owner, and he ought to be in possession of it all the time necessary by law to acquire the right of prescription; so that if before the completion of this time bad faith intervenes he cannot prescribe,<sup>19</sup> Ll. 12. and 14. tit. 28. P. 3. [Ll. 12 and 14. tit. 29. P. 3.] unless he received the thing by way of gift, or exchange, in which cases good faith at the time of delivery is sufficient,<sup>20</sup> L. 12. tit. 29. P. 3. [L. 12. tit. 29. P. 3.] 4th, In the same way<sup>21</sup> if such possessor, knowing that the thing did not belong to the person who transferred it to him, should sell it to another before the expiration of the time necessary to complete his prescriptive right, the latter cannot take it by prescription, because there existed bad faith at the time of its passing to him,<sup>21</sup> L. 12. tit. 29. P. 3., [L. 12. tit. 29. P. 3.] so that it follows that there must exist good faith at the commencement of the possession of the thing, L. 12. tit. 29. P. 3. [L. 12. tit. 29. P. 3.] 5th, If with respect to slaves or animals this bad faith supervenes before the females conceive or are with young, he shall not acquire

<sup>18</sup> For a less price than its real value. See the law quoted in the text.

<sup>19</sup> In other words, if he is conscious that he derives his possession from a wrong doer the right of prescription is at an end.

<sup>20</sup> The difference pointed out by L. 12. tit. 29. P. 3., between the possession acquired under a transfer by gift or exchange, and under that by sale, is not noticed in the text. It would appear from the law cited, that in the two first-mentioned cases of donation and exchange, *bona fides* in the person prescribing was sufficient at the time of delivery to him of possession; and that the previous or after belief on his part of wrong, or *mala fides* in the person from whom he derived possession, would not interrupt or put an end to his prescription; but that, in the case of transfer by sale, *bona fides* in the possessor was essential, both at the time of his making the bargain, and of his receiving possession. There seems also to exist a variance between the canon and civil laws with respect to the interruption and destruction, or non ditto of the prescriptive right, in the case of a *bona fide* possessor arriving at the subsequent knowledge of the tortious title of the person from or through whom he derived possession; which is adverted to by Wood, C. L., book 2. c. 4. p. 166. 1 Browne's C. L., ch. 8. p. 247.

<sup>21</sup> This appears a very extraordinary distinction, for, advertent to what was said in note 20, and referring to L. 12. tit. 29. P. 3., it would seem that a purchaser, in whom there existed *bona fides* at the time of bargain and delivery, regarding the contract or transfer as that of sale from a wrong doer, might perfect his title by his uninterrupted completion of the prescriptive term, though he should after such delivery to him, come to the knowledge of the tortious conduct of the vendor; but that if with such knowledge he should, before the expiration of the time required to complete his prescriptive possession, sell to a third person, the right of prescription would cease or be destroyed.

the young,<sup>22</sup> L. 5. tit. 29. P. 3. [L. 5. tit. 29. P. 3.] 6th, There is not bad faith in one who acquires a thing through the medium of an attorney, if the latter informed his constituent that it was [ 97 ] transferred to him by a just title, although it be false; because the error arises in respect of the principal by a lawful reason or way, L. 14. tit. 29. P. 3. [L. 14. tit. 29. P. 3.]

§ 2. Just title consists in the cause or consideration by which possession of the thing is obtained, being one of those by reason of which dominion is acquired, as purchase, gift, inheritance, &c., Ll. 9. 14, and 15. tit. 29. P. 3. [Ll. 9. 14, and 15. tit. 29. P. 3.]

§ 3. There is a capacity in the thing if it is from its nature capable of prescription, and therefore sacred and religious things can't be acquired by time, nor civil jurisdiction,<sup>23</sup> nor tributes and royal rights, L. 6. tit. 29. P. 3. [L. 6. tit. 29. P. 3.]

§ 4. In order that the person may be able to prescribe, it is necessary, 1st, That he be of sane mind; wherefore the madman and idiot (*desmemoriado*) cannot begin to prescribe; but if previously to becoming mad such a one began to acquire, the capacity of person will continue in and enure to him or his heirs, L. 2. tit. 29. P. 3. [L. 2. tit. 29. P. 3.] It will be sufficient that the capacity exists in the attorney who may prescribe for the principal; in which case the *bad faith* of the former does not prejudice the latter, as we have already said, Ll. 13, and 14.<sup>24</sup> tit. 29. P. 3. [Ll. 13, and 14. tit. 29. P. 3.] Mortgagee and lessee cannot prescribe, because they are in possession in the name of another, L. 4. tit. 15. lib. 4. Recop. [L. 1. tit. 8. lib. 11. Nov. Rec.] 4th, Nor can one joint heir or co-partner prescribe against another, L. 5. tit. 15. lib. 4. Rec. [L. 2. tit. 8. lib. 11. Nov. Rec.]

§ 5. Continued or uninterrupted possession is necessary to the acquiring the thing. By possession we understand the lawful possession (*tenencia derecha*) which a man has of things corporeal with the assistance of the body and mind, L. 1. tit. 30. P. 3. [L. 1. tit. 30. P. 3.] There are two sorts of possession; one natural, as when corporal possession is had of the thing, as of a house, an estate, &c., L. 2. tit. 30. P. 3. [L. 2. tit. 30. P. 3.], and the other civil, or by permission or sanction of law, as when a person goes out of or quits his house with an intention of not relinquishing it, then he is in possession by will (*de voluntad*), and this is as valid as though he were in corporal possession, L. 2. tit. 30. P. 3. [L. 2. tit. 30. P. 3.] The possession of things incorporeal, as services (*servidumbres*), rights (*derechos*), &c., is proved by use and the sufferance of the owner, L. 1. tit. 30. P. 3. [L. 1. tit. 30. P. 3.]

<sup>22</sup> No more, it is presumed, than he would acquire the mothers, in case they should have been obtained originally by theft or unlawful means. See L. 2. tit. 8. lib. 11. Nov. Rec.: and Azevedo, on L. 5. tit. 15. lib. 4. Rec. n. 17, 18.

<sup>23</sup> See L. 4. tit. 8. lib. 11., Nov. Rec.

<sup>24</sup> Superfluous; does not bear.

§ 6. Every person of sound mind may gain the possession of things by himself or by another, duly authorised or empowered by him. Hence it is, 1st, That children acquire or hold possession for [ 98 ] their parents, and the attorney for his principal, L. 3. and 11. tit. 30. P. 3. [L. 3. 11. tit. 30. P. 3.] 2d, The guardian or curator for the ward or minor, the madman, and the spendthrift (*degastador*), L. 4. tit. 30. P. 3. [L. 4. tit. 30. P. 3.] The officer of the corporation (*oficial del comun*) of any city or town for the corporation whose officer he is, L. 4. tit. 30. P. 3. [L. 4. tit. 30. P. 3.] 4th, Laborers and ploughmen who are tenants or lessees of any estate for the proprietor of it, L. 5. and 9. tit. 30. P. 3. [L. 5. and 9. tit. 30. P. 3.] 5th, He who should promise to hold possession of a thing for the person in whose name he promises to possess it, L. 3.<sup>25</sup> tit. 30. P. 3. [L. 3. tit. 30. P. 3.] 6th, The friend or inn-keeper (*huesped*), &c., for him in whose name he has possession, L. 12. tit. 30. P. 3. Possession is also gained by those modes which transfer dominion; of which various examples may be seen in L. 7, 8, 9, 10, 11, and 15. tit. 30. P. 3. [L. 7, 8, 9, 10, 11, and 15. tit. 30. P. 3.]

§ 7. As possession consists in corporally or mentally possessing (*tenencia*) the thing, it follows that the possession of personal property (*muebles*) will be lost, 1st, Always when the thing is reduced to that state in which it cannot be possessed corporally, nor by will (*de voluntad*), of which examples are given in L. 14. and 17. tit. 30. P. 3. [L. 14. and 17. tit. 30. P. 3.]; but in those cases the owner, although he loses the possession, does not lose the dominion, and therefore may recover the thing from the possessor, L. 14. tit. 30. P. 3. [L. 14. tit. 30. P. 3.] 2d, The possession of real property (*cosas raices*) is lost, if the possessor is evicted by force; if when he is not present, another enters on it and prevents his re-entry; and if, seeing that another enters on his property, he submits to it and does not drive out the intruder, L. 17. tit. 30. P. 3. [L. 17. tit. 30. P. 3.]; but in neither of these cases does he lose the dominion.<sup>26</sup>

§ 8. No one ought to be dispossessed without a hearing, L. 2. tit. 15. lib. 4. Rec. [L. 9. tit. 8. lib. 11. Nov. Rec.], nor can the creditor of his own authority enter by force on the property of his debtor, but shall be obliged to pursue his remedy by another mode, as laid down by L. 5. and 6. tit. 15. lib. 4. Rec. [L. 2. and 5. tit. 8. lib. 11. Nov. Rec.]; neither can the property of the deceased be taken possession of without the will of the heirs, nor the inheritance of one who is in the service of the king, L. 3. tit. 15. lib. 4. Rec. [L. 3. tit. 8. lib. 11. Nov. Rec.]; but he who possesses the thing a year and a day in the face of the claimant or plaintiff, according to the custom of some cities, ought not to be compelled to answer with respect to the posses-

<sup>25</sup> *Quære* L. 5. *ibid.*

<sup>26</sup> And he has his remedy at law, to expel the disturber or disseisor, and recover back possession. See L. 1. tit. 8. lib. 11., Nov. Rec.; and L. 10. tit. 29. P. 3., as to possession obtained by violence or robbery: also L. 3. tit. 8. lib. 11. Nov. Rec.; and L. 1. tit. 34. lib. 11., *ibid.*

sion, provided he have it<sup>27</sup> with title and good faith L. 3. tit. 15. lib. 4. Rec. [L. 3. tit. 8. lib. 11. Nov. Rec.]

§ 9. Continued or uninterrupted possession for the time pointed out by the laws, causes prescription. Hence it follows: 1st, That possession being interrupted or impeded by any reason or cause, also interrupts or impedes prescription; so that in order to prescribe subsequently, the person must begin to possess anew, L. 29. tit. 29. P. 3. [L. 29. tit. 29. P. 3.] 2d, That prescription is interrupted by the interposition of a judicial demand, or even by a simple complaint, (*querella*), and by a claim made before the neighbors of the [ 99 ] place where the house or property is situate; and if the possessor be a minor before his guardian, L. 29. and 30. tit. 29. P. 3. 3d, That if the debtor wishes to gain by time or prescription what he owes, and renews the obligation, or makes an acknowledgment of the debt, in this case the prescription is interrupted, L. 29. tit. 29. P. 3. [L. 29. tit. 29. P. 4.]

§ 10. The time in which things are prescribed, is comprehended under the two kinds of prescription, immemorial and temporal. The first is proved by witnesses of good fame or character, who depose to having seen the person in possession of the thing or property for forty years, and having heard their ancestors say that they never saw nor heard any thing to the contrary, L. 1. tit. 7. lib. 5. Rec.<sup>28</sup> [L. 1. tit. 17. lib. 10. Nov. Rec.] By immemorial possession, the seignory or dominion of cities, towns, and civil and criminal jurisdiction, are acquired; but not that which kings possess by their pre-eminence and prerogative, nor taxes, nor tributes, L. 1. tit. 15. lib. 5. Rec., [L. 4. tit. 8. lib. 11. Nov. Rec.,] which ought to be taken as an exception to what we have before said. Neither by it are duties (*alcabalas*) prescribed, although the doing so may have been tolerated or permitted, L. 2. tit. 15. lib. 4. Rec. [L. 9. tit. 8. lib. 11. Nov. Rec.] Nor is the right to raise or levy taxes or impositions acquired, L. 8. tit. 15. lib. 4. Rec. [L. 7. tit. 8. lib. 11. Nov. Rec.] It may be remarked, that the right of prescription, as to dominion or property, is interrupted by the interruption of possession, L. 7. tit. 15. lib. 4. Rec. [L. 6. tit. 8. lib. 11. Nov. Rec.]

§ 11. Temporal prescription is confined or limited to a certain number of years. To this sort belong, 1st, The limitation of a year, in which the claim to the penalty incurred by judicial bail for not producing the person bailed, is prescribed, L. 10. tit. 16. lib. 5. Rec. [L. 1. tit. 11. lib. 10. Nov. Rec.] 2d, The prescription of three years, in which personal property is acquired,<sup>29</sup> L. 15. and 17. tit. 29. P. 3., [L. 15. and 17. tit. 29. P. 3.,] and the salaries or wages of apothecaries.

<sup>27</sup> See L. 3. tit. 8. lib. 11. Nov. Rec. *ad fin.*

<sup>28</sup> See also L. 5. tit. 8. lib. 11. Nov. Rec.

<sup>29</sup> See the exception in the case where such property is mortgaged or pledged, in L. 17. tit. 29. P. 3.: and see also the cases in L. 1. tit. 8. lib. 11. Nov. Rec., in which plea of prescription cannot be set up.

caries, spice venders, and other tradesmen, or mechanics,<sup>30</sup> in respect of their wares and work, L. 9. tit. 15. lib. 4. Rec.; [L. 10. tit. 11. lib. 10. Nov. Rec.;] and the fees (*salarios*) of advocates and solicitors are prescribed, L. 32. tit. 16. lib. 2. Rec. [L. 9. tit. 11. lib. 10. Nov. Rec.] 3d, The prescription of ten years, in which real property (*las raices*) is acquired among persons present, L. 18. tit. 29. P. 3.; [L. 18. tit. 29. P. 3.;] and in which the executive action is barred, L. 6. tit. 15. lib. 4. Rec. [L. 5. tit. 8. lib. 11. Nov. Rec.] 4th, That of twenty years, which prescribes the right of absent persons to real property, L. 18. tit. 29. P. 3., [L. 18. tit. 29. P. 3.,] and the personal [ 100 ] action and execution (*executoria*) granted thereon, L. 6. tit. 15. lib. 4. Rec.<sup>31</sup> [L. 5. tit. 8. lib. 11. Nov. Rec.] 5th, That of thirty years, in which property generally is acquired, ven without good faith; with the difference, that in case of there being good faith, if

<sup>30</sup> Of any servants, adds *Palacios*, if they have not demanded from their employers their wages within three years after they quitted their service.

<sup>31</sup> Great doubt, and some obscurity, have been thrown upon the effect of this law, as it regards the prescription of personal actions, and the execution (*executoria*) granted thereon, in consequence of the conflicting speculations and opposite conclusions of the learned commentators. The first part of the law prescribes the right of execution, on a simple obligation, in ten years, and then proceeds to say, "*y la accion personal y la executoria dada sobre ella se prescriba por veinte años, y no menos*," but extends the period of prescription to thirty years in the case of a mortgage or hypothecary security, or in that where the obligation is mixed, being personal and real. The doubt started is, whether the right of execution granted on a sentence, declared a case adjudged "*cosa juzgada*," arising out of a personal action, is prescribed by ten years' silence, or whether it is entitled to the full extension of the twenty years allowed for the prescription of the original action itself, without reference to the time that may have elapsed between the date of the cause of action, and the obtaining the sentence; supposing, of course, it did not exceed the entire limited duration of the prescription. Supporters of both opinions are found amongst the most learned annotators on the laws of Spain, and it may perhaps be considered presumptuous in the translator of this work to pretend to solve the doubt raised on the occasion; but he hopes he may be permitted to offer some observations on the point, without subjecting himself to such a charge. The noble and learned author of the Practical Institutes on Civil Actions, *el Conde de la Cañada*, P. 2. ch. 13. p. 464. N. 34., in referring to this dispute of commentators, has pronounced in favor of those who have advanced the second doctrine. With due submission, however, to so justly respected an authority, the opinion the noble writer has espoused, does not appear correct: but it would seem, the law meant the prescription of a personal action to begin to count from the time the cause of action itself arose, and to bar or limit the party's claim, including his right to proceed executively thereon, after the conclusion or adjudication of sentence in the ordinary process, in the prescribed term of twenty years. The law evidently intended to place a mortgage, or hypothecary convention or obligation, upon a higher footing than a mere personal action, unsupported by such a highly considered security; which, from its public nature, in the mode of registry required by the Spanish law for its validity, warned the public of the debt due by the debtor, and of the security possessed by the creditor. Now, if this were not the case, and it had been intended by the law under consideration to give this much favored security no advantage over a mere personal action, as to its prescription, any provision or notice with regard to the time for prescribing a mortgage was superfluous. But if the opinion of the writers, to which the noble and learned author adverted to has given his sanction, were to be adopted, a naked, silent, personal action would be on an equal footing with a public registered mortgage; for a party suing out an execution on a judgment confessed or awarded in a personal cause adjudicated, by the expiration of ten years, might claim the benefit of twenty more years of silence or inactivity, without the plea of prescription being available against him, and thereby secure to himself altogether as long a sanction for forbearance or negligence, as if his demand had been originally founded on mortgage. It is, however,

another deprives the possessor by prescription of the property, he may sue for its recovery, unless it be the right owner who ousted him; but if he possessed it with bad faith, he cannot demand back the possession, except in cases where the property was stolen from him, or he was deprived of it by the judge for not answering on citation, and he should not demand it within the year, L. 21. tit. 29. P. 3. [L. 21. tit. 29. P. 3.] Actions real, hypothecary, and mixed, are also prescribed in thirty years, L. 6. tit. 15. lib. 4. Rec. [L. 5. tit. 8. lib. 11. Nov. Rec.]

to be observed, that the words of the law are "*y la accion personal, y la executoria dada sobre ella se prescriba*," (in the singular,) and it may be thence urged that the conjunction is used disjunctively, and not copulatively. The reader may form his own conclusions upon the point, by referring to the noble compiler of the Practical Institutes in the No. quoted; and in those preceding it, to No. 29. inclusive. Also to *Carleval de Judiciis*, tit. 3. disput. 4. N. 6. et seq. *Azevedo* on L. 6. tit. 15. lib. 4. de la Rec. No. 42. *Anton. Gomez* on L. 63. *Toro*; *Parladorius rer. Quotidian.* Lib. 1. Cap. 1. § 14. p. 14, &c.



## TITLE III.

## OF TESTAMENTS AND INHERITANCES.

[ 104 ] THE second right in the thing is that by inheritance; which is no more than the right of succeeding to the property which a deceased person had at the time of his death: an inheritance is gained by testament, or *ab intestato*, *Prolog.* tit. 13. P. 6. [Prol. tit. 13, P. 6.]

Cap. 1. § 1. Testament is a testimonial in which is contained and set forth the will of him who makes it, establishing or appointing his heir, and disposing, as he thinks fit, of his property after his death, L. 1. tit. 1. P. 6. [L. 1. tit. 1. P. 6.]

It is of two sorts, open (*abierto*) and closed (*cerrado*). The open, or nuncupative will, ought to be executed before a public *escribano* and three witnesses,<sup>1</sup> inhabitants of the place; and if the testator is blind, five are necessary; and if there is no *escribano*, five witnesses of the place are requisite, unless they cannot be met with, and then three inhabitants of the place, or seven strangers or non-residents (*forasteros*) will be sufficient, L. 1. tit. 4. lib. 5. Rec. [L. 1. tit. 18. lib. 10. Nov. Rec.] The closed, or written will,<sup>2</sup> which is made in secret (*en poridad*), according to L. 2. tit. 1. P. 6., [L. 2. tit. 1. P. 6.] is delivered to the *escribano*, signed on the outside by the testator and seven witnesses, with the attestation of the *escribano*, L. 2. tit. 4. lib. 5. Rec. [L. 2. tit. 18. lib. 10. Nov. Rec.]

§ 2. All those whom the laws do not expressly prohibit, may make a testament, L. 13. tit. 1. P. 6. [L. 13. tit. 1. P. 6.] Wherefore 1st, The child who is under the power of the father, if a male above fourteen, or if a female, above twelve years of age, may make a testament, L. 4. tit. 4. lib. 5. Rec., [L. 4. tit. 18. lib. 10. Nov. Rec.] which alters<sup>3</sup> in this respect, L. 13. tit. 1. P. 6. 2d, The madman cannot make a testament, nor the spendthrift (*degastador*), who shall be prohibited by the judge from aliening his property, L. 13. tit. 1. P. 6. [L. 13. tit. 1. P. 6.] 3d, Nor they who are deaf and dumb from

<sup>1</sup> By order of his Royal Highness the Prince Regent in Council, 8th June, 1816, proclaimed in Trinidad 9th August, 1816, all wills, testaments, and codicils made within the Island of Trinidad, shall be attested by three male witnesses, domiciliated inhabitants of the place and quarter wherein the same shall be made, or of two such witnesses, and the Commandant of such quarter. *Vide* Appendix M.

<sup>2</sup> Although an open or nuncupative will may also be in writing, according to L. 1. tit. 1. p. 6.

<sup>3</sup> L. 4. tit. 18. lib. 10. Nov. Rec. does not alter L. 13. tit. 1. P. 6., it only declares, that a son or daughter, although under parental power, may make a testament, if of legitimate or competent age to make such; which age is fixed by the law of the 6th *Partida* cited; and see *Azevedo* on L. 4. tit. 4. lib. 5. Rec. n. 1.

birth,<sup>4</sup> but those who should become so from sickness, are permitted to make a testament if written with their own hand, L. 13. tit. 1. P. 6. [L. 13. tit. 1. P. 6.] 4th, The person condemned<sup>5</sup> for crime may dispose by testament of his property, with the exception of that confiscated,<sup>6</sup> L. 3. tit. 4. lib. 5. Rec., [L. 3. tit. 18. lib. 10. Nov. Rec.] which alters L. 15. tit. 1. P. 6. 5th, The heretic convict, or the adjudged traitor, cannot make a testament,<sup>7</sup> L. 16. tit. 1. P. 6. [L. 15. tit. 1. P. 6.] 6th, They who embrace a religious order, may make a testament before they take the vow, but not after (*antes de la [ 105 ] profesion*), &c., L. 17. tit. 1. P. 6. and L. 11. tit. 6. lib. 3. [L. 17. tit. 1. P. 6.] *Fuero Real*. 7th, A clergyman may dispose of any of his property by way of last will, L. 3. tit. 21. P. 1. [L. 3. tit. 21. P. 1.] 8th, The pilgrim may freely dispose of his property by testament, L. 2. tit. 12. lib. 1. Rec. [L. 2. tit. 30. lib. 1. Nov. Rec.]

§ 3. The persons who cannot make a testament, cannot be witnesses to one,<sup>8</sup> nor can women, Ll. 9. and 10. tit. 1. P. 6. [Ll. 9 and 10. tit. 1. P. 6.]

§ 4. As the will of man is of such a nature that it varies in many ways, L. 25. tit. 1. P. 6., [L. 25. tit. 1. P. 6.] the testator is at liberty to change his testament as often as he pleases up to his death, L. 25. tit. 1. P. 6. [L. 25. tit. 1. P. 6.] This may happen in two ways, either by making another testament, or by tearing up or destroying that already made.

Hence it is, in order that the testament last made may revoke or annul antecedent ones, it must be complete; that is, with the same solemnities and requisites we have before spoken of, [Ll. 21. and 23. tit. 1. P. 6. [Ll. 21. and 23. tit. 1. P. 6.]] 2d, That if in the last testament the heir is changed for a certain or assigned reason or motive which shall prove to be false, it shall not deprive the first heir of the inheritance, although the second or last testament may take effect as to the bequests or legacies, L. 21. tit. 1. P. 6. [L. 21. tit. 1. P. 6.] 3d, That the cancellation of the testament ought to be made inten-

<sup>4</sup> That is, if such person be without understanding; otherwise he is not prohibited, it would seem. See *Gr. Lopez*. Gl. 11. on L. 13. tit. 1. P. 6.

<sup>5</sup> To natural or civil death; by which last is meant banishment or transportation.

<sup>6</sup> That is, so declared by law, as attaching to the commission of the crime; or shall be declared confiscated by the sentence of the judge. See *Azevedo* on L. 4. tit. 4. lib. 5. Rec.; and see L. 3. tit. 18. lib. 10. Nov. Rec.

<sup>7</sup> Nor by L. 16. tit. 1. P. 6. cited, can persons convicted of libels charging others with infamous offences.

<sup>8</sup> Members of religious orders (*religiosos*), observes *Palacios*, cannot make a will, and yet there is no statute or law, which prohibits them from being witnesses to one. There are others, also, on the contrary, who are prohibited from being witnesses, and are not prohibited from making a will. Such, in the first place, are women, those adjudged thieves or robbers, persons guilty of homicide, and those who have committed similar offences, L. 9. tit. 1. P. 6. Such persons labor under an absolute disability, differing from those who are subject to a relative disqualification. Such are children in respect of the will of their parents, &c. Ll. 14. tit. 16. P. 3.

Women are mentioned in the text as an exception; and the remaining persons set forth in the note of the learned professor, are incompetent as witnesses, by reason of infamy, relationship, interest, &c. See further Ll. 9, 10. and 11. tit. 1. P. 6.

tionally, and not accidentally, L. 24. tit. 1. P. 6., [L. 24. tit. 1. P. 6.] which says, that it is enough to tear part of the writing in order to render it invalid.<sup>9</sup>

From the liberty which every one possesses to make a will, it follows that whoever shall impede or restrain it by fraud or force, shall be deprived of that part which he was entitled to inherit or take from the testator, and which shall be applied to the exchequer (*camara*), Ll. 26. and 27. tit. 1. P. 6.; [Ll. 26. and 27. tit. 1. P. 6.] and even if any injury results from his conduct, he shall be obliged to make satisfaction to the injured party in double the amount, L. 29. tit. 1. P. 6. [L. 29. tit. 1. P. 6.]

§ 5. Hence it also arises, that another person may be authorised to make a testament for the principal, L. 6. tit. 5. lib. 3. *Fuero Real*, who is called delegate or substitute (*comisario*), whose powers are established under these laws. 1st, That the delegate [106] cannot meliorate (*mejorar*), substitute, nor name an heir without special power,<sup>10</sup> L. 5. tit. 4. lib. 5. Rec. [L. 1. tit. 19. lib. 10. Nov. Rec.] 2d, That having only a general power, he can merely discharge the conscientious duties of the testator; as paying debts, disposing of the fifth for the benefit of his soul, dividing the remnant between the heirs *ab intestato*, and if there be none, disposing of it for pious uses, L. 6. tit. 4. lib. 5. Rec. [L. 2. tit. 19. lib. 10. Nov. Rec.] 3d, That without special power, he cannot revoke the testament, nor any disposition made by it, Ll. 8. and 9. tit. 4. lib. 5. Rec. [Ll. 4. and 5. tit. 19. lib. 10. Nov. Rec.] 4th, That the heir being appointed by the testator, the *comisario* can only dispose of the fifth,<sup>11</sup> L. 11. tit. 4. lib. 5. Rec., [L. 6. tit. 19. lib. 10. Nov. Rec.] and not doing it, the heirs<sup>12</sup> are to distribute the fifth for the benefit of the testator's soul, L. 10. tit. 4. lib. 5. Rec. [L. 13. tit. 20. lib. 10. Nov. Rec.] 5th, The time he has for making the necessary dispositions is four months; if he be out of the place, six months; and one year if he be absent from the kingdom, L. 7. tit. 4. lib. 5. Rec. [L. 3. tit. 19. lib. 10. Nov. Rec.] 6th, If there be many delegates (*comisarios*), and some die, the power remains entire to the survivor; and if there be a disagreement,<sup>13</sup> they must have recourse to the judge to determine it, [L. 12. tit. 4. lib. 5. Rec. [L. 7. tit. 19. lib. 10. Nov. Rec.]] 7th, The power that is given to the delegate must contain or be

<sup>9</sup> Provided it be not proved to have been done accidentally, L. 24. tit. 1. P. 6. *ad fin.*

<sup>10</sup> "The testator," says *Palacios*, "naming therein the person whom he directs, the trustee, or *fidei commissary*, to institute heir, L. 9. tit. 19. lib. 10. Nov. Rec.

<sup>11</sup> "That is to say," observes *Palacios*, "that when the testator hath appointed an heir, and hath given power to another to complete his will, or the disposal of his property, the trustee (*comisario*) cannot dispose of, or bequeath, after payment or discharge of the debts and burthens of the testator, more than the fifth part of his property," unless, L. 6. tit. 19. lib. 10. Nov. Rec., cited by the learned professor, adds, the trustee is specially authorised to do more.

<sup>12</sup> And not being necessary (*forzados*) heirs. See L. 13. tit. 20. lib. 10. Nov. Rec. cited.

<sup>13</sup> It must be determined by the majority; and if no majority, recourse must be had to the assistance of the judge or *alcalde*, who forming one of the majority, will decide. See L. 7. tit. 19. lib. 10. Nov. Rec. cited.

executed with the same solemnity as the testament, L. 13. tit. 4. lib. 5. Rec. [L. 8. tit. 19. lib. 10. Nov. Rec.] 8th, The power of assigning the third and fifth by way of melioration (*mejora*), can never be delegated to another, L. 3. tit. 6. lib. 5. Rec. [L. 3. tit. 9. lib. 10. Nov. Rec.]

§ 6. The wills of soldiers who are on actual service (*en guerra actual*), do not require such solemnity, and it is sufficient that the will be proved by two witnesses, or by a simple writing under the hand (*de puño*) of the soldier, *Orden Milit. trat.* 8. tit. 11. Art. 1, 2, 3, and 4.

§ 7. A codicil is also a species of will, that is, a short writing which some men make after or before their testaments are made, L. 1. tit. 12. P. 6. [L. 1. tit. 12. P. 6.] Codicils are made with the same solemnity as the open or nuncupative testament, L. 2. tit. 4. lib. 5. Rec.; [L. 2. tit. 18. lib. 10. Nov. Rec.]; and are made use of to bequeath, to substitute an heir,<sup>14</sup> and to correct the testament, L. 1. tit. 12. P. 6. [L. 1. tit. 12. P. 6.]

Cap. 2. The most principal part of the will is the institution or appointment of an heir, the establishment of whom and other things relating thereto, we are about to explain.

The institution of an heir is the establishment by one man of another as his heir, so that he remains proprietor after the testator's death of his property, or some part of it, in the place of the testator, L. 1. tit. 3. P. 6. [L. 1. tit. 3. P. 6.]

To understand this, it is necessary to consider three things [ 107 ] 1st, Who may or may not be heirs. 2d, How and in what manner they ought to be established or appointed. 3d, How the testator may dispose of his property.

§ 1. As to what relates to the first point, we say, that every person, community, or corporate body, church, &c. may be heir, whom our laws do not prohibit from being so,<sup>15</sup> L. 2. tit. 3. P. 6. [L. 2. tit. 3. P. 6.] They prohibit, 1st, apostates, renegados, persons condemned to the mines, and associations, or bodies of men which have been formed contrary to law, or without the permission (*voluntad*) of the prince, L. 4. tit. 3. P. 6. [L. 4. tit. 3. P. 6.] 2d, The incestuous children of the clergy, who are not only rendered incompetent to inherit, but cannot enjoy any bequest from their father nor their paternal relations, L. 4. tit. 3. P. 6. and L. 6. tit. 8. lib. 5. Rec. [L. 4. tit. 3. P. 6. L. 4. tit. 20. lib. 10. Nov. Rec.] 3d, Illegitimate children, if there be lawful children or ascendants of the father; but they shall be able to inherit from their mother in preference to ascendants, and this, notwithstanding they may be the offspring of an incestuous or a con-

<sup>14</sup> An heir cannot be substituted directly, nor can a condition be imposed upon him by a codicil; neither can an inheritance be given or taken away directly by it, although it may indirectly by means of a *fidei-commissary*; not, however, it is presumed, in the case of a necessary heir. See L. 2. tit. 12. P. 6. and L. 7. tit. 3. P. 6.

<sup>15</sup> Confirmed by L. 5. *ibid.* which see.

demned intercourse<sup>16</sup> (*dañado ayuntamiento*),<sup>17</sup> L. 7. tit. 8. lib. 5. Rec. [L. 5. tit. 20. lib. 10. Nov. Rec.] which amends L. 11.<sup>18</sup> tit. 3. P. 6. 4th, Illegitimate children do not inherit, but in default of legitimate children; but they must be made legitimate by a subsequent marriage, or by the royal authority,<sup>19</sup> L. 10. tit. 8. lib. 5. Rec., and L. 9. tit. 15. P. 4. [L. 7. tit. 20. lib. 10. Nov. Rec. L. 9. tit. 15. P. 4.]

§ 2. The establishment of heir ought to be made in a complete or finished testament (*acabado*) and not in any other writing,<sup>20</sup> L. 7. tit. 3. P. 6. [L. 7. tit. 3. P. 6.], with his express nomination, absolutely or conditionally.

Hence it follows, 1st, That the institution of heir cannot be made in a codicil, unless it takes its force or effect from some clauses expressed in the testament; but if it be declared by the testament, that a part of the testator's property shall be assigned by the codicil to the heir named in the testament, and no expression or specification of this part is afterwards made in the codicil he shall be absolute heir of the testator's property, which is not devised or bequeathed to another, L. 9. tit. 3. P. 6. [L. 9. tit. 3. P. 6.], and if there were two persons so appointed, they shall inherit equal parts, L. 9. tit. 3. P. 6. [L. 9. tit. 3. P. 6.] 2d, The heir named or appointed by the will, cannot be set aside or deprived of the inheritance by the codicil,<sup>21</sup> although a person may be substituted by it to succeed him, L. 7. tit. 3. P. 6. [L. 7. tit. 3. P. 6.] 3d, A person being once absolutely or unconditionally instituted heir by the testament, cannot be saddled with any condition by the codicil, L. 8. tit. 3. P. 6. [L. 8. tit. 3. P. 6.] 4th, If there be two persons of the same name, some particular circumstance should be expressed, in order that the intention of the testator may be known and clearly understood, L. 10. tit. 3. P. 6. [L. 10. tit. 3. P. 6.] 5th, That this circumstance should not be defamatory (*infamatoria*) because it annuls the establishment of heir; although it will not produce such effect, if the testator only speaks ill of him generally, L. 10. tit. 3. P. 6. 6th, That the nomination or appointment is not valid, if a mistake be made in the person of the heir, L. 12. tit. 3. P. 6. [L. 12. tit. 3. P. 6.] 7th, That a person being established heir of a certain part of the testator's property, if no

<sup>16</sup> This is wrong. The law cited prohibits such from inheriting from their mothers, either *ex testamento* or *ab intestato*; but permits the mother to give during life, or to bequeath to them, the 5th part of her property, and no more, which she is allowed to dispose of for the benefit of her soul.

<sup>17</sup> Such for which the mother is liable to suffer death. See. L. 5. tit. 20. lib. 10. Nov. Rec.

<sup>18</sup> The citation is erroneous; it is supposed L. 4. of the same title and part. is meant.

<sup>19</sup> If legitimated by royal authority, they are excluded from inheriting by the subsequent birth of legitimate children, or by the connubial legitimation of illegitimate ones, although they are on an equal footing with both the others, as to honors and pre-eminences, and other things in right of their parents. See L. 7. tit. 20. lib. 10. Nov. Rec., cited.

<sup>20</sup> i. e. codicil. See the law cited.

<sup>21</sup> See note 14.

other heir is appointed, the first will be heir of the whole property<sup>22</sup> (provided there be no necessary (*forzosos*) heirs of the testator), and if in the same manner there be two persons appointed, they shall divide the inheritance in the above case; which rule is also understood to take place in the case of one person being named heir of one portion of the property, and two persons of the other proportion, L. 14. tit. 3. P. 6. [L. 14. tit. 3. P. 6.] 8th, That if the poor people of any city be left heirs, the appointment will be understood to regard those who may be found disabled in the hospitals, and not those who ask charity in the streets; and if no particular place or city is specified, the poor of the place where the will was made, will be the heirs, L. 20. tit. 3. P. 6. [L. 20. tit. 3. P. 6.] 9th, That if the establishment of heir is made to take effect at or from a certain day, the time will be considered as not expressed,<sup>23</sup> L. 15. tit. 3. P. 6. [L. 15. tit. 3. P. 6.] Condition is a sort of declaration which testators are wont to express in the establishment of heirs, for the purpose of extending to them the enjoyment of the inheritance, or of the bequest, until the condition be fulfilled, L. 1. tit. 4. P. 6. [L. 1. tit. 4. P. 6.] Conditions are express or tacit. Some relate to the time past, others to the present, and others to the future. Of these some are possible and others impossible. The impossible ones cannot be fulfilled, either as being contrary to nature, or to law, or to fact, or for being doubtful and obscure. Of the possible conditions some depend on the power of men, others on contingency, and others on both together, L. 1. tit. 4. P. 6.

The condition of time past, present, and future, is valid in the institution, L. 2. tit. 4. P. 6. [L. 2. tit. 4. P. 6.] Impossible conditions against nature do not vitiate the nomination of heir, and are considered as not expressed, L. 3. tit. 4. P. 6. [L. 3. tit. 4. P. 6.] The same we say as to the impossible conditions against law, under which title are comprehended those that are immoral, and [109] contrary to piety, good manners, and the law of nature, Ll. 3. and 6. tit. 4. P. 6. [Ll. 3. and 6. tit. 4. P. 6.] Conditions contrary to fact, those which are doubtful and obscure, vitiate or invalidate the institution of heir, L. 5. tit. 4. P. 6. [L. 5. tit. 4. P. 6.]

Possible conditions must be first performed before the person named heir can obtain possession of the inheritance or bequest, Ll. 7, 8, and 9. tit. 4. P. 6. [Ll. 7, 8, and 9. tit. 4. P. 6.] The tacit, or silent condition is that which is understood to be the will of the testator. See L. 10. tit. 4. P. 6.<sup>24</sup> [L. 10. tit. 4. P. 6.]

<sup>22</sup> It would seem that the testator's heir at law would, in this case, take or inherit the remainder, or undisposed part of the testator's property, under L. 1. tit. 18. lib. 10. Nov. Rec.; which law directs this course in the case of there being no heir at all instituted or appointed under the testator's will.

<sup>23</sup> In other words, the appointment will take effect immediately on the death of the testator: but it is said by *Palacios*, in a note on this passage, that Law 1. tit. 18. lib. 10. Nov. Rec. alters this provision in L. 15. tit. 3. p. 6.; and that such an appointment will take effect according to the testamentary direction, and the intention of the testator.

<sup>24</sup> The case put is, if testator have two sons, and leave his property equally between

But it is to be observed, 1st, That if two persons be established heirs, one conditionally, and the other purely, the first will not prevent the latter from immediately obtaining his proportion of the inheritance, L. 12. tit. 4. P. 6. [L. 12. tit. 4. P. 6.] 2d, That if there be many conditions together, or joint, all ought to be fulfilled, in order that the establishment may be valid; and if they are separate at the election of the heir, it will be sufficient that he fulfil one, L. 13. tit. 4. P. 6. [L. 13. tit. 4. P. 6.] 3d, That if the condition fails to be fulfilled by fault of him who imposed it, the nomination of heir is valid. See Ll. 14, 15, and 16. tit. 4. P. 6.<sup>25</sup> [Ll. 14, 15, and 16. tit. 4. P. 6.]

§ 3. With respect to the mode in which a testator may dispose of his property, it is an indisputable principle of the laws of Castille, that if he have children or grandchildren, &c., he must necessarily institute them heirs, and can only dispose in favor of strangers,<sup>26</sup> or other persons, of the remnant of one-fifth of his property; because, out of this, before all things, are defrayed the expenses of interment, masses, &c.; and, in the second place, he has the privilege or liberty of bettering (*mejorar*) any of his children or grandchildren he shall please, by the addition of the third,<sup>27</sup> (that is, the third part of his property, the fifth being deducted,) L. 9. tit. 5. lib. 3. *Fuero Real*. L. 13. tit. 6. lib. 5. Rec. and L. 214. *de Estilo*. [L. 9. tit. 20. lib. 10. Nov. Rec.] In default of children and grandchildren, (*descendientes*), a testator must devise or bequeath in favor of his fathers and grandfathers, or ascendants, if he should have any, with the exception of the third,<sup>28</sup> of which he can dispose freely; and this takes place if there be no custom to the contrary, L. 1. tit. 8. lib. 5. Rec. [L. 1. tit. 20. lib. 10. Nov. Rec.]

both, with benefit of survivorship, and one son die, leaving issue, the law interprets the testator's will to be, that the children shall take their father's share, and not their surviving uncle. The interpretation is different if the devisees be two strangers, and not the sons, (or heirs *forzosos* of the testator,) who would take according to the real meaning of the words of the devise.

<sup>25</sup> There is a case mentioned in L. 14. tit. 4. p. 6., in which, although the condition fails to be performed without the fault of him who imposed it, yet the establishment of heir does not take place; as if the condition should be, that such a woman should be heir of testator, if she married with such a person; then, if either should die before the fulfilment of the condition, the appointment would not take place; and no condition can be imposed to the prejudice, or in regard, it is presumed, of the legitimate shares of the inheritance of necessary heirs.

<sup>26</sup> Collateral relations are so considered in this respect.

<sup>27</sup> *Palacios* (nota 2) on this passage says, that a parent may better (*mejorar*) any one of his children by the bequest or devise of the third and the remnant of the fifth (*en el tercio y remnante del quinto*) of his property, provided he should not dispose of the remnant of the fifth in favor of a stranger; and that is what is said with respect to the *tercio* being the third part of the property, after the fifth being deducted, is understood when both *mejoras* of third and fifth (*tercio y quinto*) have been granted; and the testator should not wish the *tercio* to be deducted before the *quinto*: and see L. 3. tit. 6. lib. 10. Nov. Rec.

<sup>28</sup> It seems by L. 6. tit. 20. lib. 10. Nov. Rec., that a testator may bequeath in entire prejudice, or exclusion of his parents or ascendants, in favor of his natural children, provided he has no lawful children or descendants. See this law.

From this principle we conclude, 1st, That if the testator has no necessary (*Forzosos*) heirs who have been mentioned, he may leave his property to strangers, L. 3. tit. 5. lib. 3. *Fuero Real*; which title includes relations who are not of the descending or ascending line, L. 21. tit. 3. P. 6.; [L. 21. tit. 3. P. 6.;] and in such case may take place what is laid down in L. 16, 17, 18, and 19. tit. 3. P. 6.<sup>29</sup> [L. 16, 17, 18, and 19. tit. 3. P. 6.] 2d, That the agreement between husband and wife to inherit reciprocally the property of each [110] other, if they have no children, is valid,<sup>30</sup> L. 9. tit. 6. lib. 3. *Fuero Real*. 3d, That he who has no natural children, may leave his adoptive child his heir, L. 5. tit. 6. lib. 3. *Fuero Real*. 4th, That although the illegitimate children of the mother may not inherit her property, if she has legitimate ones, she may bequeath them a fifth, even though the offspring of condemned connection, (*de duñado coito*), L. 7. tit. 8. lib. 5. Rec. [L. 5. tit. 20. lib. 10. Nov. Rec.] 5th, The father may also leave to his bastard and legitimated child the fifth of his property, [L. 3. tit. 6. lib. 3. *Fuero Real*; and L. 10. tit. 8. lib. 5. Rec., [L. 7. tit. 20. lib. 10. Nov. Rec.] and in this manner must be understood, L. 8. tit. 8. lib. 5. Rec.<sup>31</sup> [L. 6. tit. 20. lib. 10. Nov. Rec.] 6th, That neither during life nor at death, can a testator grant or bequeath in *mejora* more than one-fifth,<sup>32</sup> L. 12. tit. 6. lib. 5. Rec. [L. 8. tit. 20. lib. 10. Nov. Rec.]

With respect to the third (*tercio*) of the inheritance, it is inferred from the aforesaid axiom, 1st, That in regard of the *mejora* of the third, conditions, burthens, (*gravámenes*), entails, (*mayorazgo*), trusts, (*fideicomiso*), charges, &c., (*vinculos*), may be imposed or created<sup>33</sup> among the lawful descendants, and afterwards among the illegitimate; and in default of these, among the ascendants; and in default of these, among collateral relations; and lastly, among strangers, L. 11. tit. 6. lib. 5. Rec. [L. 11. tit. 6. lib. 10. Nov. Rec.] 2d, That the *mejora* of the third in favor of children and descendants may be revoked until the hour of death, except the possession hath been delivered, or the deed of writing executed before an *escribano*, or was made for an *onerous* cause, as marriage,<sup>34</sup> L. 1. tit. 6. lib. 5. Rec. [L. 1. tit. 6. lib. 10. Nov. Rec.] 3d, That if fathers covenant

<sup>29</sup> As to the division, into as many parts as the testator pleases, &c. of his property.

<sup>30</sup> *Palacios*, in note (1) on this passage, says that this agreement between husband and wife, (*hermandad*), would not be valid, although they should leave no lawful descendants or children, if they should leave ascendants or parents, if it were in prejudice of the latter; because, by L. 1. tit. 20. lib. 10. Nov. Rec., the property of the descendants is the inheritance and lawful right of their ascendants, excepting the third, if the former die without children or lawful descendants.

<sup>31</sup> See Note <sup>29</sup>, p. 104. *ante*.

<sup>32</sup> See Note <sup>27</sup>, p. 104. *ante*.

<sup>33</sup> See L. 12. tit. 17. lib. 10. Nov. Rec. Neither entails, charges, nor perpetual burthens, can be established or imposed without the royal permission.

<sup>34</sup> It is besides necessary that, in such cases, no power hath been reserved in the contract to revoke it, nor that there exist any of those causes which are considered just or sufficient in law to revoke donations. See L. 1. tit. 6. lib. 10. Nov. Rec., cited in the text.



by contract to meliorate, (*mejorar*), or not to do so, they are bound to fulfil the covenant, L. 6. tit. 6. lib. 5. Rec. [L. 6. tit. 6. lib. 10. Nov. Rec.] 4th, That the melioration may be made in favor of the grand-child, although the father dies, L. 2. tit. 6. lib. 5. Rec. [L. 2. tit. 6. lib. 10. Nov. Rec.] 5th, That the faculty or power of meliorating (*mejorar*) by *tercio* and *quinto* cannot be committed to another,<sup>35</sup> L. 3. tit. 6. lib. 5. Rec. [L. 3. tit. 3. lib. 10. Nov. Rec.] 6th, That the heir should pay the *mejora* out of the property pointed out by the testator, except it cannot be divided, in which case he shall pay the value in money, L. 4. tit. 6. lib. 5. Rec. [L. 4. tit. 6. lib. 10. Nov. Rec.] 7th, That the person meliorated may renounce the inheritance, and accept the melioration, (*mejora*), paying first the debts, and deducting them *pro rata* from the said *mejora*, L. 5. tit. 6. lib. 5. Rec. [L. 5. tit. 6. lib. 10. Nov. Rec.] 8th, That the value of the *mejora* must be considered with reference to the period of the death of the testator, L. 7. tit. 6. lib. 5. Rec. [L. 7. tit. 6. lib. 10. Nov. Rec.] 9th, That the *mejoras* of the third and fifth are not taken out of [ 111 ] "*Dotes*," donations *propter nuptias*, and other donations which shall be brought into collation, (*colacion*), L. 9. tit. 6. lib. 5. Rec. [L. 9. tit. 6. lib. 10. Nov. Rec.] 10th, That the *mejora* is valid, although the testament be set aside on account of preterition or disinheritance, L. 8. tit. 6. lib. 5. Rec. [L. 8. tit. 6. lib. 10. Nov. Rec.] 11th, That if the parents, by testament or by contract or deed, make a donation to one child, such child is understood to be benefited (*mejorado*) in the amount of the third and fifth in addition to the lawful part or share (*legitima*<sup>36</sup>) of the parent's property, although they may not so express it, L. 10. tit. 6. lib. 5. Rec. [L. 10. tit. 6. lib. 10. Nov. Rec.]

From all that has been said, we draw one general conclusion, that all the property of the parents is the lawful portion or right (*la legitima*) of the children, with the exception of a fifth; and the property of the child, who dies without issue or descendants, belongs of right, (*son legitima*) to the parents, with the exception of a third, for any regard to the Falcidian and Trebellian portions of the Romans, of which tit. 11 P. 6. speaks, is totally foreign from our law at this present.

Cap. 3. All that we have said with respect to necessary heirs (*he-*

<sup>35</sup> Rather that the power of assignment of the *mejora* cannot be committed to another. See L. 3. tit. 6. lib. 10. Nov. Rec. quoted; but L. 1. tit. 19. lib. 10. Nov. Rec. says, that the *fidei-comisario* cannot *mejorar* without a special power for that purpose.

<sup>36</sup> That is, such gift, with reference to its amount, shall be considered as though given to the child by way of the third and fifth, and its legitimate share of the parents' property; but if such donation should exceed in value the third and fifth, and *legitima*, it is presumed the excess would be void; and with respect to any gift from father to daughter, by way of *dote* or marriage portion, this would be reckoned as part of her *legitima* of her father's property; and if the amount or value of the *dote* should exceed her *legitima*, the excess would be invalid, and would not be considered as a *mejora* of *tercio y quinto*, according to *Azavedo*, whom see on L. 10. tit. 6. lib. 5. Rec., n. 6. and 22; which is L. 10. tit. 6. lib. 10. Nov. Rec.

*rederos forzosos*) ceases if there intervene just cause of disinherison. To disinherit is to deprive a person of the right he had to inherit the property of his parent or grandparent, or of any other relations, L. 1. tit. 7. P. 6. [L. 1. tit. 7. P. 6.]

§ 1. Every person who can make a testament, may disinherit, L. 2. tit. 7. P. 6. [L. 2. tit. 7. P. 6.]; and so all descendants and ascendants in the direct line may be disinherited by the persons from whom they descend or ascend, L. 2. tit. 7. P. 6., and L. 1.<sup>37</sup> tit. 6. Lib. 3. *Fuero Real*.

The act of disinheriting ought to be made or expressed with the same clearness as the establishment of heir. Wherefore, 1st, The name or other exact designation must be expressed, which may show with certainty who it is that is disinherited; but if the testator shall only have one child, it is not necessary that he expressly name it, L. 3. tit. 7. P. 6. [L. 3. tit. 7. P. 6.]. 2d, That the disinherison should be made of the whole inheritance, and without condition, L. 3. tit. 7. P. 7. [L. 3. tit. 7. P. 6.]. 3d, That some one of the causes of disinherison to be mentioned, must intervene and be expressed by the testator, and which the heirs<sup>38</sup> must prove, L. 10. tit. 7. P. 6. [L. 10. tit. 7. P. 8.]. 4th. That the disinherison may be set forth in any part of the testament, L. 9. tit. 7. P. 6. [L. 9. tit. 7. P. 6.].

§ 2. The causes for disinheriting descendants are, 1st, The [112] waylaying or preparatives against the life of the parent; slander; and an accusation from which infamy or dishonor may result to the parent, except it be for an offence against the king<sup>39</sup>, L. 4. tit. 7. P. 6. [L. 4. tit. 7. P. 6.]. 2d, Practising witchcraft, sorcery, or keeping company with those who do (if it be that there are any persons of such description). 3d, Adultery of the son with the wife<sup>40</sup> of the father. 4th, Not giving bail or security for the father, if imprisoned for debt. 5th, Preventing a parent from making a testament, L. 4. tit. 7. P. 6. [L. 4. tit. 7. P. 6.]. 6th, Clandestine marriage of children, L. 1. tit. 1. lib. 5. Rec. [L. 3. t. 2. lib. 10. Nov. Rec.] 7th, The daughter who also prostitutes herself may be disinherited; but not if she does it after twenty-five years of age, and in consequence of her father not having endeavored to get her married, L. 5. tit. 7. P. 6. [L. 5. tit. 7. P. 6.]. 8th, The son also who does not take care of his insane or disabled father may be disinherited by the judge or by his father, if he returns to a sound state of mind, L. 5. tit. 7. P. 6. [L. 5. tit. 7. P. 6.]. It is to be observed that these two cases do not include persons under eighteen years of age, L. 6. tit. 7. P. 6. [L. 6. tit. 7. P. 6.]. 9th, So may the child and near relations who will not redeem the parent from captivity, whose property in this case ought to be sold

<sup>37</sup> This quotation from the *Fuero Real* seems erroneous; the law cited from the *Partidas*, however, fully supports the text.

<sup>38</sup> Or, in English legal phraseology, more properly, devisees, or legatees.

<sup>39</sup> Or commonwealth.

<sup>40</sup> That is, the step-mother of the son, or any woman who is the concubine of his father  
See L. 4. tit. 7. P. 6.

by the diocesan for the redemption of captives. 10th, Finally<sup>41</sup>, the person who abandons the catholic religion<sup>42</sup> may be disinherited, L. 7. tit. 7. P. 6. [L. 7. tit. 7. P. 6].

§ 3. For the same causes, and under the same disposition of law, with the exception of the 2d, 4th, 6th, and 7th, may children disinherit their parents and other ascendants as expressed by L. 11. tit. 7. P. 6. [L. 11. tit. 7. P. 6.]

§ 4. Brothers may disinherit expressly or tacitly; that is, naming their brothers and other relations of the collateral line with cause or without it; but there is this difference, that in disinheriting them without cause, if the testator appoint as heir a man of infamous or bad character,<sup>43</sup> this appointment will not be valid, and the brother or relation shall inherit; but if there be a just cause expressed, the will cannot be set aside. These just causes are reduced to the attempting or the committing something against the life of the testator, or in deterioration of his property,<sup>44</sup> L. 12. tit. 7. P. 6. [L. 12. tit. 7. P. 6.]

§ 5. Besides what has been mentioned, there are other causes for which generally an heir ought to lose the inheritance of the deceased, which are, 1st, If the heir should enter on the inheritance before pre-[ 113 ] ferring a charge or accusation (*querella*) to the judge of the death of the deceased testator, caused by those of his family; or if it were committed by a stranger, and he should not prefer the charge within five years, L. 13. tit. 7. P. 6. [L. 13. tit. 7. P. 6.], and L. 11. tit. 8. lib. 5. Rec.<sup>45</sup> [L. 11. tit. 20. lib. 10. Nov. Rec.], which is not understood with regard to minors, L. 11. tit. 8. lib. 5. Rec. [L. 11. tit. 20. lib. 10. Nov. Rec.], nor as to the heir who, after having made the complaint or accusation, should desist from it, L. 15. tit. 7. P. 6. [L. 15. tit. 7. P. 6.] 2d, If it be evident who killed the testator, and the heir should open the will without accusing them, L. 13. tit. 7. P. 6. [L. 13. tit. 7. P. 6.] 3d, The alleging the will in which he was established heir to be a false instrument, whether he do it as party or advocate, unless it be in his quality of fiscal, or as the guardian of any minor, L. 13. tit. 7. P. 6. 4th, The delivering the inheritance to one prohibited by law to receive it, although it be at the request of

<sup>41</sup> L. 5. tit. 7. P. 6. mentions, as causes of disinherison by father, his son's fighting with another man, or with beasts, for money.

<sup>42</sup> Or becomes heretic. It is to be hoped that the severity of this law is not enforced, but that it is obsolete in practice, and will not in the present state of liberal feeling in Spain be long allowed to remain on the statute book: the last part of the law gives the property of a lay person who is, and whose relations to the tenth degree are heretics, to the crown; and if such person be a *clerigo* to the church, if it should claim within a year after the person is declared a heretic, and on default of such claim by the church, the property goes to the crown. See L. 7. tit. 7. P. 6. N. B. This note was written during the existence of the Cortes in Spain.

<sup>43</sup> Or had been a slave of the testator, or one that he had emancipated; and it seems the difference mentioned, only takes place with respect to brothers of the testator, and not other collateral relations; for the latter cannot, in any case, prefer a complaint against the will. See L. 12. tit. 7. P. 6., cited, and L. 2. tit. 8. P. 6.

<sup>44</sup> That is to say, the greater part of it. See L. 12. tit. 7. P. 6., cited.

<sup>45</sup> Which last cited law requires, in order to produce such effect, the murderer to be known to the heir, and that he be in the country; and the heir to be able or wealthy enough (*poderoso*) to prosecute for the murder. See L. 11. tit. 20. lib. 10. Nov. Rec.

the testator, because he then loses the right which he may have, L. 13. tit. 7. P. 6. [L. 13. tit. 7. P. 6.]

When for any of these causes the heir loses or forfeits the inheritance, it devolves to the exchequer (*camara*), L. 13. tit. 7. P. 6., and L. 11. tit. 8. lib. 5. Rec. [L. 13. tit. 7. P. 6., and L. 11. tit. 20. lib. 10. Nov. Rec.], the collector (*recaudador*) of which shall be obliged to fulfil the will of the testator in regard of the other part of the will, reserving the fourth for the king, which must be paid out of the legacies (*mandas*) when the rest of the property shall not be sufficient, L. 16. tit. 7. P. 6. [L. 16. tit. 7. P. 6.]; see L. 17. tit. 7. P. 6. [L. 17. tit. 7. P. 6.] We are not aware that this is practised in the present day.

Cap. 4. As the persons who are established heirs are bound to prove the cause which intervened or existed to justify the disinherison, it follows; 1st, That the necessary (*forzosos*) heirs have a right to allege before the judge their complaint *inofficiosi testamenti*; which is nothing more than a complaint preferred against the testament made contrary to the duties of piety and affection, L. 1. tit. 8. P. 6. [L. 1. tit. 8. P. 6.] 2d, That parents may be wanting in their duty either by improperly disinheriting their necessary heirs or by omitting them in their will,<sup>46</sup> L. 1. tit. 8. P. 6. [L. 1. tit. 8. P. 6.] 3d, That in either case all those we have mentioned may complain, L. 1. tit. 8. P. 6. 4th, That brothers can only do it when the person appointed heir is of bad character; although it will be sufficient to leave a legacy to collateral relations to prevent their being able to complain against such an appointment,<sup>47</sup> L. 2. tit. 8. P. 6. [L. 2. tit. 8. P. 6.]

This complaint cannot be preferred, 1st, after the expiration [114] of five years from the period the heir entered on the inheritance, unless the complainant be under twenty-five years of age, when he is allowed four years after his coming of age to prefer it, L. 4. tit. 8. P. 6. [L. 4. tit. 8. P. 6.] 2d, In the case where the necessary heir approves the testament by which he was disinherited, L. 6. tit. 8. P. 6. [L. 6. tit. 8. P. 6.]

The effect of this suit is to deprive the person established heir of the inheritance, and to give to him who hath preferred a just com-

<sup>46</sup> It may be well here to notice the difference between express and tacit disinherison or omission, which last is termed *preterition*, as clearly pointed out in L. 1. tit. 8. P. 6. here cited. It would appear by this law, and also by L. 10. tit. 7. P. 6., that it is not necessary for the heir *forzoso*, actually passed by, *preteritus*, to prefer the complaint *inofficiosi testamenti*; but that on account of such *preterition*, the will is, *ipso jure*, null and void in respect of the *legitima* of such necessary heir, although the bequests, &c. in the will would hold good, in so far as they did not trench on the *legitima* of the necessary heir, the institution of this complaint being only requisite on the part of the heir *forzoso*, who is expressly disinherited with or without cause. See *Gr. Lop.* Gl. 9. and 10. L. 1. tit. 8. P. 6.; and also *Gom. var. res.* Cap. 11. *de suc. cont. Test.* numb. 1. 35. 36. &c. L. 1. tit. 18. lib. 10. Nov. Rec. *Azevedo* on L. 1. tit. 4. lib. 5. Rec. numb. 94. to 97. and numb. 106. L. 7. tit. 8. P. 6. and Gl. 7. *Greg. Lop.* on said last law.

<sup>47</sup> This is not required by the law cited in the text, nor by any other that has come within my research; nor yet does it in any way affect the right of brothers to the advantage given them in the law cited, and in the case mentioned in the text.

plaint; unless the former be brother of or related in the same degree to the latter, who in such case must have his proportion, but in other respects the will remains valid, L. 7. tit. 8. P. 6. [L. 7. tit. 8. P. 6.] The reason of this last is, that the institution or appointment of an heir is not an indispensable circumstance to the validity of a will or testament, L. 1. tit. 4. lib. 5. Rec. [L. 1. tit. 18. lib. 10. Nov. Rec.] whence it arises that if the testator hath omitted any child or necessary heir, the testament is invalid or set aside in that part which may relate to such heir and subsists in regard to the other parts, L. 1. tit. 4. lib. 5. Rec. [L. 1. tit. 18. lib. 10. Nov. Rec.]

## TITLE IV.

OF THE DELIVERY AND DIVISION OF THE INHERITANCE, AND OF  
SUCCESSION AB INTESTATO.

IN order to know to whom delivery of the inheritance is to [ 116 ] be given, publication of the will is made, for which purpose those interested appear before the judge presenting a petition, praying, that the witnesses may be ordered to acknowledge their signatures: immediately the will is opened<sup>1</sup> by the *escribano*, and those who are found to be interested accept plainly with benefit of inventory, or reject the inheritance.<sup>2</sup> The testament or will must be presented before the judge within a month after the death of the testator, L. 14. tit. 4. lib. 5. Rec.<sup>3</sup> [L. 5. tit. 18. lib. 10. Nov. Rec.]; but if it was not executed before an *escribano*, and only before seven witnesses, as prescribed by Ll. 1. and 2. tit. 4. lib. 5. Rec. [Ll. 1. and 2. tit. 18. lib. 10. Nov. Rec.], the will or writing is presented to the judge; and the witnesses being examined it is ordered to be protocolled.

Cap. 1. Delivery is the corporal seisin or possession which the heir receives of the property that belongs to him, L. 1. tit. 14. P. 6. [L. 1. tit. 14. P. 6.] The delivery of property or dominion (*propiedad*) is distinct from that of possession; and this last is never denied or refused, when it is demanded in virtue of the hereditary appointment, although there may be another who opposes it, unless the possessor shall desire to allege his reasons; or provided the other produces an equal hereditary appointment; in which case they ought to be heard, and the possession adjudged to him who has best right, Ll. 2. and 3. tit. 14. P. 6. [Ll. 2. and 3. tit. 14. P. 6.] The delivery of property or dominion comprehends not only the property which the testator possessed when he died, but also the existing fruits or produce (*frutos*), which ought to be ordered to be restored to the heir, Ll. 4, 5, 6, and 7. tit. 14. P. 6.<sup>4</sup> [Ll. 4, 5, 6, and 7. tit. 14. P. 6.]

<sup>1</sup> By the Judge, before the witnesses and the *escribano*, and read and published by the latter, according to *Palacios*. In regard to Trinidad, *vide* additional rules, Court of First Instance of Civil Jurisdiction on Testamentary proceedings, March 22d, 1823; and as to testification of wills, *vide* Order in Council, 8th June, 1816, Append. N. and M.

<sup>2</sup> Or may demand time to consider and advise whether they will accept or reject it. See *Pre.* tit. 6. P. 6. and Ll. 1. and 2. *ibid.* which last points out the time allowed for such deliberation.

<sup>3</sup> And for this law, the executor who omits to do so, loses any bequest or legacy that may be bequeathed to him by the will. And in case of there not being any, he is liable in damages to the party injured by his neglect, and to the payment of 2,000 *maravedis* for the use of the crown (*camara*), L. 5. tit. 18. lib. 10. Nov. Rec.

<sup>4</sup> The first three of these laws apply and point out the different consequences as to such restitution with regard to the person who possessed *bonâ fide*, and him who possessed *malâ fide*; the last cited law relates to prescription as against the heir entitled.

§ 2. The things belonging to the inheritance are verified by the inventory, which is an account in writing taken of the property of the deceased, L. 5. tit. 6. P. 6.; [L. 5. tit. 6. P. 6.]; all those must make it who are obliged to give an account of the inheritance before an *escribano* and witnesses within thirty days<sup>5</sup> after notice hath been had of the inheritance, and must be finished within three months at [ 117 ] most, if the property be in the same place; but if it should be at a distance, the term may be prorogued to a year or more<sup>6</sup> according to the circumstances, L. 5. tit. 6. P. 6., and L. 100. tit. 18. P. 3. [L. 5. tit. 6. P. 6., L. 100. tit. 18. P. 3.]

This instrument, or account in writing, may be well termed a *benefit*, because many are the benefits which the heir derives from it; the most remarkable among them are, 1st, That the heir cannot be sued for more than the amount or value of the property which he inherits, Ll. 5, 7, and 10. tit. 6. P. 6. [Ll. 5, 7, and 10. tit. 6. P. 6.] 2d, That no suit can be instituted during the time it is forming,<sup>7</sup> L. 7. tit. 6. P. 6. [L. 7. tit. 6. P. 6.]

If the renunciation be made, the inheritance cannot be demanded; but if the heir were a minor, he has a term of three years to retract, Ll. 18. and 20. tit. 6. P. 6.<sup>8</sup> [Ll. 18. and 20. tit. 6. P. 6.]

Cap. 2. As there are oftentimes two or more persons appointed heirs by a testament, between whom a division of the inheritance must be made, it is necessary to know that partition is a division which men make among them of the things which they have in common by inheritance, or by any other cause, L. 1. tit. 15. P. 6. [L. 1. tit. 15. P. 6.]

This partition, 1st, Ought to be made between the heirs named in the will. 2d, Of the things which were the property of the testator. 3d, Before a competent judge.

From the first it is deduced, 1st, That either of the heirs may require partition of the property, L. 2. tit. 15. P. 6. [L. 2. tit. 15. P. 6.] 2d, That all the property, except the fifth and the third, if there should be any, is divided between them in equal parts. This appears from the whole of Tit. 6. lib. 5. Rec.<sup>9</sup> [Tit. 6. and 20. lib. 10. Nov. Rec.] 3d, That the papers or deeds be in the possession of the principal heir, or of whomsoever the testator shall name, Ll. 7. and 8. tit. 15. P. 6. [Ll. 7. and 8. tit. 15. P. 6.]

To the second principle belongs the collation or manifestation (*colacion*) of property; which the *Partidas* call *amojonamiento*,<sup>10</sup>

<sup>5</sup> That is, it must be begun within that time.

<sup>6</sup> Beyond or exclusive of the three months first allowed; and the inventory must be signed by the heir. L. 100 tit. 18. P. 3., cited, gives the form of such inventory, &c.

<sup>7</sup> It would seem *secus* for funeral expenses, &c. See *Greg. Lop. Gl.* 7., or L. 7. tit. 6. P. 6.

<sup>8</sup> *Quere*, If he be a minor, if he have not four years after he come of age. L. 20. tit. 6. P. 6., says, that he has three years allowed him to retract, if the renunciation be made after he is twenty-five, provided the property be not in the meantime alienated.

<sup>9</sup> See Ll. tit. 21. lib. 10. Nov. Rec.

<sup>10</sup> *Palacios* on this, (*nota*), says, that no where does he find that *amojonamiento* signifies

which takes place among brothers, L. 3. tit. 15. P. 6. [L. 3. tit. 15. P. 6.] Into this collation are to be brought, 1st, The merchandise which either of the brothers may have gained with the property or money (*caudal*) of the father during the time he was under his father's power, L. 3. tit. 15. P. 6. 2d, The *dote*, *arras*, and other donations which they may have received from the father, [118] which are imputed or counted in the lawful share (*legítima*) or portion which should belong to such child of the inheritance of its father, *Azev. á la* L. 9. tit. 6. lib. 5. Rec. n. 1.; [L. 9. tit. 6. lib. 10. Nov. Rec.]; but these *dotes* and donations, if they are inofficious, that is, exceeding the fifth and third of melioration, (*de mejoría*), and the said lawful share<sup>11</sup> ought to be returned to the heirs, in order to be divided among them, L. 3. tit. 8. lib. 5. Rec.; [L. 5. tit. 3. lib. 10. Nov. Rec.]; which alters Ll. 3. and 4. tit. 5. P. 6., and explains Ll. 9. and 10. tit. 6. lib. 5. Rec. [Ll. 9. and 10. tit. 6. lib. 10. Nov. Rec.] In order to prove *dote* inofficious, attention is had to the value of the property at the time of establishing or paying it, or at the time of the death of him who gave it, according to the election of the child to whom it was left; and in regard of other donations, consideration is had to the value of the property at the time of the death of him who made them, L. 3. tit. 8. lib. 5. Rec. [L. 5. tit. 3. lib. 10. Nov. Rec.] 3d, The *dote* which any one might give to the father, in consideration of his child, is not brought into collation, but shall be the property of the child, L. 6. tit. 15. P. 6. [L. 6. tit. 15. P. 6.] *Azevedo á la* L. 3. tit. 8. lib. 5. Rec. n. 27.<sup>12</sup> [L. 5. tit. 3. lib. 10. Nov. Rec.] 4th, The debts which the son contracted in the life of the father by his command, or which were converted to his use, or brought into *collation*, L. 6. tit. 15. P. 6. [L. 6. tit. 15. P. 6.] The property acquired in war, (*bienes castrenses*), adventitious property, or that acquired by industry, are the particular property of the child who acquired them, and do not enter into the common mass of property which must be divided, L. 5. tit. 15. P. 6. [L. 5. tit. 15. P. 6.] 6th, Neither are the sums (*gastos*) which the father expended in the particular instruction or education (*enseñanza*) of each child included in this mass, L. 5. tit. 15. P. 6. 7th, The heir who may gather the fruits or products of the inheritance is obliged to bring them into *collation*, provided the improvements (*mejoras*) and expense he made or was at in the gathering the fruits shall be restored to him, L. 6. tit. 15. P. 6. [L. 6. tit. 15. P. 6.] 8th, The things which are unlawfully acquired do not enter into *collation*, and are to be restored to their owners; and

*colación de bienes*: but that the word is used in the *Partidas* to designate the boundaries or limits of estates by means of land-marks; and he refers to L. 30. tit. 14. P. 7.: and also to tit. 15. P. 6.: I suppose L. 20. of said title is particularly meant.

<sup>11</sup> See L. 6. tit. 3. lib. 10. Nov. Rec., which regulated, &c. the quantity or amount of *dote*, &c. allowed to be given by parents to their daughters by way of marriage portions, &c.

<sup>12</sup> This last quotation is incorrect.



if they are not to be found, shall be employed for the good of the soul of the testator, L. 2. tit. 15. P. 6. [L. 2. tit. 15. P. 6.]

According to the third principle the judge before whom this partition must be made, must be the judge of the place where the property to be divided is situate, L. 10. tit. 15. P. 6. [L. 10. tit. 15. P. 6.] Hence it is, 1st, That the things which by their nature cannot be divided, ought to be valued and assigned to one of the heirs, so that the value in money may be divided equally among all, L. 10. tit. 15. P. 6. [119] [L. 10. tit. 15. P. 6.] 2d, The judge ought to determine causes which may be agitated among the heirs respecting the boundaries of the estates, L. 10. tit. 15. P. 6. 3d, He ought, officially, after the partition is made, to oblige each heir to warrant (*dar eviccion*) to the other the part of the inheritance which might be assigned him, to indemnify or make satisfaction to him in case he should be deprived of it at law; but if the testator shall assign to the heirs their particular parts or shares, they are not obliged to make this mutual warranty<sup>13</sup>, L. 9. tit. 15. P. 6. [L. 9. tit. 15. P. 6.]

Cap. 3. Whenever the intention of the deceased is not expressed or declared, by reason of his not having made a testament, or if the one made by him be not valid as explained by L. 1. tit. 13. P. 6.<sup>14</sup>, [L. 1. tit. 13. P. 6.], the relations of preferable lineage and degree of kindred succeed.

§ 1. Kindred (*grado*) is a body (*manera*) of different persons, who are united by kin, L. 3. tit. 6. P. 4. Lineage (*linea*) is the ordained union of persons who hold one with the other, as chains descending from one root, and make among themselves different or separate degree of kindred, L. 2. tit. 6. P. 4. [L. 2. tit. 6. P. 4.]

There are three kinds; the right ascending line as father, grandfather, &c.; the right descending line as child, grandchild, &c., and the transversal or collateral line, which begins with brothers, and descends by their children.

By the civil law, there are as many degrees in the right line, as there are persons, taking away one, which is the root from whence they spring, and thus the grandson is in the second degree in respect of the grandfather, and in this our law agrees with the canon. In the collateral line there is a difference, for the law of the laity observes the same rule in the computation of degrees as in the right line; and the canon counts as many degrees between the collaterals as the person the most remote is removed or distant from the common root, which will be made evident from the following example. John is the father of James, and he the uncle by kindred (*tio carnal*) of Peter. James and Peter are distant from each other three degrees by the civil law, because three persons are reckoned, taking away the

<sup>13</sup> This, it is presumed, must be taken with some qualification: it might happen, that the heir to whom any particular part of the parent's estate was devised, might be evicted by reason of the defect of such ancestor's title, and be thus deprived of his *legitima* or legal share of the parent's property. See *Greg. Lop.* Gl. 2. on the law cited in the text.

<sup>14</sup> See also L. 1. tit. 18. lib. 10. Nov. Rec.

root from which they both spring, which is John; and by the canon law they are only distant two degrees, because Peter is distant so many from his grandfather John, in respect of whom he is more remote than James is. So one brother is in the second degree of kindred in respect of another brother by the civil law, and in the first by the canon.

§ 2. In successions *ab intestato*, the descendants hold the [120] first place, and among them children, without regard to sex, inherit the property of the deceased<sup>15</sup>, L. 3. tit. 13. P. 6. [L. 3. tit. 13. P. 6.] As in the right line the right representation<sup>16</sup> takes place, it hence arises, 1st, That if a person dies without testament, leaving a child, and a grandchild, the child of a deceased son or daughter, the child and the grandchild will succeed and inherit equally, because the grandchild represents the person of its father, L. 3. tit. 13. P. 6. [L. 3. tit. 13. P. 6.] 2d, That if there were many grandchildren as they represent only one person, they will succeed to one half of the inheritance, reserving the other half for their uncle, or the child of the deceased, which is called succession *in stirpem*. 3d, That if the person dying intestate, shall leave a grandchild, the child of his son<sup>17</sup> who is dead and three or more grandchildren of another son also deceased, the latter will succeed to one half of the property of their grandfather jointly with their cousin; because although they be many, they represent the sole person of their father, L. 3. tit. 13. P. 6. [L. 3. tit. 13. P. 6.]

§ 3. As it happens that there are bastards and children born from an incestuous and condemned (*doñado*) intercourse of the same father with a different mother, or on the contrary, it must be observed, 1st, That no bastard inherits without being first legitimated, L. 17. tit. 6. lib. 3. *Fuero Real*, *Azevedo á la* L. 7. tit. 8. lib. 5. Rec. n. 7. [L. 5. tit. 20. lib. 10. Nov. Rec.] 2d, That even after being legitimated, they cannot succeed, if there be lawful children, L. 10. tit. 8. lib. 5. Rec. [L. 7. tit. 20. lib. 10. Nov. Rec.] 3d, That illegitimate children succeed to their mother in default of lawful ones, and are preferred to ascendants, because the mother is clear or certain, but not the father. There is an exception with respect to children born from a condemned (*dañado*) intercourse, where the mother by such intercourse or connection deserves the punishment of death,<sup>18</sup> L. 7. tit. 8. lib. 5. Rec. [L. 5. tit. 20. lib. 10. Nov. Rec.]; by which Ll. 8, 9, 10,

<sup>15</sup> L. 7. tit. 13. p. 6. says, a wife shall be entitled to a fourth of husband's property at his decease, not exceeding 100 *libras de oro*, provided she be poor, without *dote*, &c. not having wherewithal to live decently, although there are necessary heirs of deceased; and *Gr. Lop.* gl. 1. on this law says, the rule extends to a husband in like case; perhaps, this may be considered in the light of an alimentary allowance to the party.

<sup>16</sup> *Palacios* (note 2) observes, that this is understood of the right descending line, for that in respect of the right ascending line there is no right of representation.

<sup>17</sup> It must be always kept in mind that, by the Spanish law of descents or succession of property, equal regard is had to both sexes.

<sup>18</sup> And also with respect to children of the clergy, friars, and professed nuns, where the mother does not incur such punishment.

and 11. tit. 13. P. 6. [Ll. 8, 9, 10, and 11. tit. 13. P. 6.], are repealed, or cease.

In default of descendants, ascendants succeed or inherit; and being those who ascend by the right or direct line, it follows, 1st, That if there are no children, grandchildren, &c., the parents succeed; and in default of them, grandparents, on the part of the father and of the mother, without distinction of paternal, maternal, and *ganancial* property,<sup>19</sup> L. 4. tit. 13. P. 6. [L. 4. tit. 13. P. 6.], which is not in [ 121 ] force, where L. 10. tit. 6. lib. 3. *Fuero Real* is observed; according to which, the paternal ascendants alone inherit the property on the part of the father, and the maternal that on the part of the mother,<sup>20</sup> *Lopez á la* L. 4. tit. 13. Part. 6. Glos. 2. 2d, That in the grandparents there exists the right of representation from the fathers who were to inherit from their children, if they had lived; and, therefore, the grandchild dying, its grandparents will inherit its property, the father being dead,<sup>21</sup> L. 4. tit. 13. P. 6. [L. 4. tit. 13. P. 6.] 3d, That the brother does not succeed to the brother, if there be ascendants, L. 4. tit. 8. lib. 5. Rec. [L. 2. tit. 20. lib. 10. Nov. Rec.] which repeals, as to this part, L. 4. tit. 13. P. 6. 4th, That ascendants succeed to their bastard children, when once legitimated. § 5. It appears from what has been said, that in default of descendants and ascendants, collaterals, or persons related by blood, begin to succeed. In this line are preferred brothers and their children, or the nephews and nieces of the deceased; so that the nephews<sup>22</sup> being many, succeed equally with their uncle, or *in stirpem*, L. 5. tit. 13. P. 6. and L. 5. tit. 8. lib. 5. Rec. [L. 2. tit. 20. lib. 10. Nov. Rec.]; but the nephews will divide among themselves *per capita*, the portion which belongs to them.<sup>23</sup> 2d, The brothers and nephews, on the part of the father alone, or of the mother, do not succeed, if there be brothers on both parts, L. 5. tit. 8. lib. 5. Rec. [L. 2. tit. 20. lib. 10. Nov. Rec.] 3d, The brothers of the father alone inherit the property on the part of the father; and so respectively, the brothers on the part of the mother; and they will inherit equally the property acquired by any other cause, L. 6. tit. 13. P. 6. [L. 6. tit. 13. P. 6.] In default of brothers of the deceased and of his lineage, the cousins of the deceased and their lineage are admitted to the succession, by reason of nearest relationship.<sup>24</sup>

In default of descendants, ascendants, and collaterals, the crown, or exchequer (*la real camara*), succeeds to the property of an intes-

<sup>19</sup> Equally, and see L. 1. tit. 20. lib. 10. Nov. Rec.

<sup>20</sup> Equally with respect to *ganancial* property, by the law of the *Fuero Real*, cited.

<sup>21</sup> See note 16. p. 128. *ante*. *Palacios* here adds, that the grandparents do not inherit from their grandchildren by right of representation, but as being nearest of kin; and instances that if a child were to die, with direct descendants, and without a father, but leaving a mother, she would inherit in exclusion of the paternal grandfather, though such were living.

<sup>22</sup> *Palacios* properly observes, if the fathers of such nephews be dead, but not otherwise.

<sup>23</sup> As representing their deceased father.

<sup>24</sup> That is, the nearest relation in such case succeeds.

tate, L. 12. tit. 8. lib. 5. Rec.<sup>25</sup> [L. 1. tit. 22. lib. 10. Nov. Rec.]; if within a year, the parties interested do not appear;<sup>26</sup> so that the cognisance (*conocimiento*) of the said property belongs to the ordinary judges, *Cédula of 9th October, 1766.*<sup>27</sup>

§ 6. In order to remedy the abuse, which was observed when the case of succession (*ab intestato*) happened, by the secular or ecclesiastical judges interfering to take possession of the property under the pretence of making an inventory, or of disposing of the fifth of it for the soul of the deceased, it was ordered by *Royal Ordin. of 2d February, 1766,*<sup>28</sup> [L. 14. tit. 20. lib. 10. Nov. Rec.], that thenceforward no judge should take possession of the property of intestates, but that it should be delivered entire to the heirs, conformably [ 122 ] with what is laid down in L. 10. tit. 4. lib. 5. Rec.<sup>29</sup> [L. 13. tit. 20. lib. 10. Nov. Rec.], who are to dispose of the fifth for the above-mentioned purpose; and if they omit to do it within the year, they may be compelled thereto by the judges. It is also provided by Ll. 2. and 3. tit. 9. lib. 1. Rec. [L. 3. tit. 20. lib. 10. Nov. Rec.], that the orders of "*Trinidad and Merced*" may not obtain the uncertain legacies (*mandas inciertas*), nor the fifths of the property of those who die *ab intestato*, leaving relations within the fourth degree.

<sup>25</sup> L. 6. tit. 13. P. 6. says, as does also L. 23. tit. 11. P. 4., that in default of such, husband and wife may succeed to one another; *vide* also *Paz. Prax.* 1. 'T. p. 125, n. 1. and 2.; but the law quoted in the text is later than the laws of the *Partidas* referred to, although it contains no express repeal of the provision in the laws of the *Partidas*.

<sup>26</sup> This does not form any part of L. 1. tit. 22. lib. 10. Nov. Rec., as it would seem to do from the text, but is part of L. 2. *ibid.*; which directs *cosas mostrenças* to be delivered to the judge of the place or jurisdiction where found; and if unclaimed within a year, declares them forfeited to the crown (*camara*).

<sup>27</sup> *Nota* 1. tit. 22. lib. 10. Nov. Rec.

<sup>28</sup> See L. 14. tit. 20. lib. 10. Nov. Rec.

<sup>29</sup> *Ibid.*

## TITLE V.

## OF SUBSTITUTIONS, ENTAILS, AND LEGACIES.

[ 126 ] THE succession *ab intestato* and that by testament being already known, it remains for us to explain here the other things which, as accessory thereto, testators are wont to express or declare in their last wills.

Cap. 1. Substitute is another heir who is established by the maker of the will, in the second, third, fourth, &c., degree after the first heir, L. 1. tit. 5. P. 6. [L. 1. tit. 5. P. 6.]; this is established by substitution<sup>1</sup> *vulgar*, *pupillar*, *exemplar*, and *fidei commissary*. *Vulgar* substitution takes place when the substitute is appointed, in case the heir will not, or cannot be such, L. 1. tit. 5. P. 6. [L. 1. tit. 5. P. 6.] Substitution (*pupillar*) is only appointed to the male minor under fourteen and the female under twelve years of age, being under the *patria potestad*, Ll. 1. and 5. tit. 5. P. 6. [Ll. 1. and 5. tit. 5. P. 6.] Similar to this is the substitution exemplary or quasi pupillar, by which the father appoints an heir to his child if he dies mad, L. 1. tit. 5. P. 6. [L. 1. tit. 5. P. 6.] Substitution (*fidei commissaria*)<sup>2</sup> is made by giving it in trust (*poniendo en fe*) to some one appointed heir,<sup>3</sup> to hold the inheritance for a given time, that he may deliver it afterwards to another, L. 14 tit. 5. P. 6. [L. 14. tit. 5. P. 6.]

As the end or object of these substitutions is that the testator may not remain without heirs by the death or unwillingness to accept of the person named or instituted, it is understood that the first event being expressed in any substitution, the other is also considered as expressed, L. 2. tit. 5. P. 6. [L. 2. tit. 5. P. 6.]

The substitution is to be subject to the rules which, according to our laws, testators ought to observe in establishing an heir; because the former not being at liberty to establish or institute whomsoever they please, neither can they appoint a substitute but to their immediate successor.

This idea being formed, the following consequences are drawn from it: 1st, That as there are necessary, and discretionary, or arbitrary (*arbitrarios*) heirs, so there are also necessary and discretionary substitutes. 2d, That necessary substitutions ought always to be appointed when there are necessary heirs; and discretionary ones only in default of them, or as to the remnant of the fifth of the pro-

<sup>1</sup> Or conditional institution. Vide *Halifax Roman Law*, p. 38. 39. 42. and 43. 1st *Browne, Civil Law*, c. 1. p. 331. note 109.; and *Wood, Civil Law*, Book 2. ch. 4. p. 187. to 189.

<sup>2</sup> Has only place as to *herederos extranos*; vide 1st vol. *Febr. ad.* p. 76. n. 111.; also L. 1. tit. 18. lib. 10. Nov. Rec.

<sup>3</sup> Trustee.

perty, the free disposal of which is left to the testator; or rather as to a third of it if he substitutes from among his children, ascendants, &c. 3d, That for the creation of the first the rules only apply which we have pointed out for the appointment of heir, and many laws of the 5th tit. 6th *partida*, only take place in regard of the second, as having their rise from the Roman law, which allowed to the testator more liberty as to the disposal of his property. 4th, That the substitution pupillar of the adopted child of which L. 9. tit. 5. P. 6. [L. 9. tit. 15. P. 6.] speaks, takes place in the case where he may succeed to his adoptive father. 5th, That although the male minor of fourteen, or female of twelve, enters into puberty or on the inheritance, in case of their death the substitute will succeed, provided he is next of kin; whence we may infer, that not only does the vulgar substitution comprehend the pupillar, as says L. 5. tit. 5. P. 6. [L. 5. tit. 5. P. 6.], but that also does the *pupillar* comprehend in this sense the *vulgar*;<sup>4</sup> and thus neither the puberty of the minor nor the possession (*incorporamiento*) of the inheritance ought to be counted among the modes of putting an end to the necessary substitution; but as well the vulgar as the *pupillar* is at an end by the death of the substitute, or the nearest relation of the heir being alive. 6th, The same ought to be applied to the *exemplary* or *quasi pupillar* substitution, with the difference that, with regard to that which puberty produces in the *pupillar*, the prudence or sanity of the person who was mad produces in the *exemplary* or *quasi pupillary*. Discretionary or arbitrary substitutions belong to entails<sup>5</sup> (*mayorazgos*) which being peculiar to our nation,<sup>6</sup> form the principal object of this chapter.

Cap. 2. Entail (*mayorazgo*), is the right of succeeding to the property which is left, with the condition of its being perpetuated in the family, so that it may pass to each first born by reason of succession, *Molina de Hisp. primogen.* lib. 1. cap. 1. n. 22.

§ 1. *D. Gaspar de Criales*, in the referred to order, or *carta*, of 1646. p. 30., proves that, in his time, the most ancient private entails did not exceed three hundred years in establishment; and [ 128 ] shows, in his dissertation on it, how prejudicial their establishment has been to the state of husbandry or agriculture, and to population.

It is a common opinion, that the origin and rule of these entails must be looked for in the ancient succession of the kingdom, before

<sup>4</sup> *Vide Halifax, Rom. Law*, p. 38. notes.

<sup>5</sup> *Ibid.* p. 39. n. 67.

<sup>6</sup> Entails are as common, at least as well known, in England, &c. as in Spain. In the latter country, the future creation of them is prohibited; and the whole doctrine respecting their establishment rendered of little use or regard, by the alteration of the old rules, as applying to those now in existence in Spain, under a law recently passed by the Cortes on the subject. As regards Trinidad, the laws of Spain, in force in that island at its conquest by the British arms, are observed, except in so far as they have been since repealed or altered by his Majesty: but as respects the law of *Mayorazgos*, no change has taken place. The rules, therefore, in the text, fully apply in the case of property which may be in that situation in the island, although it is believed there is very little, if any, there so circumstanced.

*N. B.* This note was written in the commencement of 1821.

it was altered by *Auto* 5. tit. 7. lib. 5. Rec. [L. 5. tit. 1. lib. 3. Nov. Rec.], and which is laid down in L. 2. tit. 15. P. 2. [L. 2. tit. 15. P. 2. in these words: "The wise and enlightened considered it right, that no one should have the sovereignty of these kingdoms but the eldest son, after the death of his father. And, to prevent many evils which might happen, or be committed, they determined that those of the direct line should always inherit the dominion or sovereignty of the kingdom; and thence they established, that if there was a son, and he would not have it, the eldest daughter should inherit the kingdom. And they also ordered, that if the eldest son should die before he inherited, and should leave a son or daughter of his lawful wife, he or she should inherit, and no other. But if all these should fail or die, the nearest relation ought to inherit the kingdom, being a man fit for it (*seyendo home para ello*), and not having done any thing for which he deserved to lose it.<sup>7</sup>

§ 2. Hence have resulted the two kinds of entails, *regular* and *irregular*. The *regular* is that in which the inheritance descends according to the ancient order of succession in the kingdom. The *irregular* is understood that in which the succession varies, *Roxas de Incomp.* Part. 1. c. 6. § 1. n. 21. and 22. *Molina* affirms, lib. 2. c. 2. n. 19., that entails followed the order of the succession of the kingdom, until by L. 13. tit. 7. lib. 5. Rec. [L. 8. tit. 17. lib. 10. Nov. Rec.] it was ordained, that the females of nearest lineage and kindred (*de mejor linea y grado*) should not be considered excluded, and should be preferred to more remote males, unless the testator disposed otherwise, excluding females clearly and distinctly, without conjectures being sufficient for the purpose.

§ 3. Entails are founded or established upon testament or by contract. The first must be reduced to writing; but this is not necessary with respect to the second,<sup>8</sup> *Molina*, lib. 2. c. 8. It follows from this, 1st, That the entail made by way of contract cannot be revoked, if possession of the property hath been delivered, or it hath been made for an onerous cause, or consideration, as marriage, &c., nor [129] even that which is made by last will, if the writing hath been delivered (*si se entrego la escritura*); although under such circumstances both may be varied by the royal permission, L. 4. tit. 7. lib. 5. Rec. [L. 4. tit. 17. lib. 10. Nov. Rec.] 2d, That persons who cannot contract, nor make wills, cannot found or establish entails. 3d, That the son *de familias* (under the patria potestas), shall not be able to do it without the permission of his father, excepting it be of property acquired by him in war (*bienes custrenses*). With respect to the

<sup>7</sup> This rule of descent or succession is conformable with the laws of England.

<sup>8</sup> *Palacios* on this (n. 1.) observes, that *Molina*, in the same chapter, 8, says, he had never seen any *mayorazgo* founded without writing or deed; and that with respect to those founded with the royal permission, a writing or deed is necessary for the proof of this license: that as at the present day no *mayorazgo* can be established without the royal license, by L. 12. tit. 17. lib. 10. Nov. Rec., it is seen that a writing or deed is necessary in all *mayorazgos* or entails.

power of a person of a religious order to do so, see *Molina*, lib. 4. c. 9. a num. 53. From what has been said in the antecedent title, with respect to the lawful share (*legítima*) of descendants and ascendants, it is understood that the royal permission is necessary to found or establish an entail of all a person's property by reason of the prejudice which ensues to the necessary (*forzosos*) heirs. Hence it is deduced, 1st, That the founder should assign to the rest of his children *dote* and competent aliment, *Molina*, lib. 2. c. 1. n. 26.; and this obligation to furnish *dote* and aliment passes to the successors of the entail, as *Molina* explains L. 2. c. 15. and 16. 2d, That if all the children give their voluntary consent (*no forzado*), the entail may be founded without the royal permission, *Molina*, lib. 2. c. 3. 3d, That the instruction or information<sup>9</sup> should precede the royal license, unless the entail already founded is approved, L. 3. tit. 7. lib. 5. Rec. [L. 2. tit. 17. lib. 10. Nov. Rec.] 4th. That in order to found an entail of the remnant of the fifth and the third, the royal permission is not necessary, L. 11. tit. 6. lib. 5. Rec.<sup>10</sup> [L. 11. tit. 6. lib. 10. Nov. Rec.] 5th, That if the founder have only one son, as he necessarily succeeds to the third, he shall not be able to burthen it (*gravarle*) without the royal permission, although this exception must be understood with some limitations, which may be seen in *Molina*, lib. 2. c. 11. a. n. 4. al. 9. 6th, That husband and wife may institute an entail without license, of that property of which they may freely dispose, *Molina*, lib. 1. c. 7. 7th, That the priest (*prelado*) may found it of his patrimonial property, and of no other, *Molina*, lib. 2. c. 10.

The founder is at liberty to impose any reasonable conditions which he may think fit. And thus, 1st, If any one is ap- [130] pointed on condition of doing a specific thing, and not otherwise, if he does not perform it, he is understood not to be appointed, and must restore the fruits of the estate. 2d, That a condition that the grantee shall marry such a one of such a family may be imposed. See *Molina*, lib. 2. c. 12. 4 num. 34. and all c. 13.

§ 4. On the similitude of private entails with the succession of the crown, are founded the following principles. 1st, That every entail be indivisible, passing from one first-born to another. 2d, That this indivisibility follow the certain order of succession. 3d, That the entails be perpetual in the family of the founder. From the first principle, which is found confirmed by *Molina*, lib. 1. c. 11., it follows, that in the succession, or among the issue, the first-born is preferred, unless he be illegitimate (*espurio*), *Molina*. lib. 3. c. 1.; but in case of doubt, as when it cannot be declared which of two sons was first born, a division<sup>11</sup> is admitted, L. 2. tit. 33. P. 7. [L. 2. tit. 33. P. 7.]

<sup>9</sup> Required, it is presumed, by L. 12. tit. 17. lib. 10. Nov. Rec., respecting the value of the property to be entailed, the rank or condition of the family of the intended founder, &c. See this law.

<sup>10</sup> See also L. 12. tit. 17. lib. 10. Nov. Rec.

<sup>11</sup> Of the estate tail.



This preference of primogeniture is wanting or omitted, 1st, When the first-born is legitimated, and there are lawful children,<sup>12</sup> *Molina*, lib. 3. c. 2. 2d, When he is a monk, clergyman,<sup>13</sup> or friar, *Roxas*, Part. 7. c. 5. 3d, By the incompatibility of the family name and arms, if it be prohibited to have them mixed with others, *Molina*, lib. 2. c. 14. num. 16. 4th, When two entails are incompatible by reason of their value, according to L. 7. tit. 7. lib. 5. Rec., [L. 7. tit. 17. lib. 10. Nov. Rec.] which enacts that if, by way or reason of marriage, two entails are united, the value of one of which is above two millions maravedis, the eldest son may succeed only to one of the two at his election, and the other passes to the second son; and if there should be only one son, or a daughter, he or she may hold them both for life; and if either has two sons, or a son and a daughter, they are divided as above, notwithstanding any clauses and appointments whatsoever in the creation of the entails, upon the disposition of which, see *Roxas* throughout all Part. 8., who asserts, in Cap. 1. num. 68., that the law in question takes effect when two entails of the above tenor are united by way of succession or inheritance. 5th, The first-born is excluded when he caused the death of the last possessor, *Molina*, lib. 2. c. 2.

As the entail, by reason of its indivisibility, must devolve to only [ 131 ] one person, it hence arises, that the two rules invented by the interpreters of the Roman law do not apply, namely, 1st, That two appointed jointly, E. G., John and James, succeed or inherit equally. 2d, That the disjunctive resolves itself into the copulative, E. G., Andrew or Peter is equivalent to Andrew and Peter, *Molina*, lib. 1. c. 6. from num. 4. to 7.

According to the order of succession which ought to be followed under this indivisibility, the kinds of lineage, regard to which is had in entails, should be understood, and they are the following: 1st, The substantial line (*linea de substancia*) is that which comprehends ascendants, descendants, and collaterals, without distinction of males or females; the preference taking place between them according to kindred or age, *Roxas*, Part. 1. cap. 6. § 2. Hence it is, 1st, That the son born before the father acquired the entail, succeeds in preference to the son who was born after, *Roxas*, Part. 1. cap. 6. § 3. 2d, That the son legitimated by the subsequent marriage is counted of the substantial line to enable him to succeed to the entail, *Roxas*, *ibid.* § 5.; but not those legitimated by rescript, which does not take away the right that another might possess, *Roxas*, *ibid.* § 6.; to whom ought to be added *Molina*, lib. 4. cap. 3. who refers to different opinions upon the subject. 3d, Natural children are not of this line,

<sup>12</sup> *Palacios* (note 1) says, that when the firstborn is legitimated by a subsequent marriage, and has been legitimated before the birth of the other legitimate children (of such marriage it is to be presumed), what is here stated by the text does not take place.

<sup>13</sup> The same learned professor also observes, that a clergyman (*clerigo*) is not passed by, unless expressly excluded by the founder; for that there is no law, practice, or reason, which excludes the clergy from such entails.

*Roxas*, Part. 1. cap. 6. § 9.; where he lays down the limitations. 4th, That in the collateral line, the brother of the last possessor, on the part of the father and mother, although younger, is preferred to the elder brother, who is so only on the part of the father, by reason of the greater kindred or relationship, *Roxas*, *ibid.* § 12.

2d, The *actual* or *effective* line, is that which the possessor of the entail occupies as lawful successor, *Roxas*, *ibid.* § 12.

3d, The *habitual*, or accustomed line, is that which the first-born constitutes or establishes, immediately as he is born, for his descendants, *Roxas*, *ibid.* § 13.; whence it is deduced, that although he die, if he leaves a son, or other descendants, they shall succeed as representing the father in preference to their uncle, unless the founder should make any other direction, L. 5. tit. 7. lib. 5. Rec.; [L. 5. tit. 17. lib. 10. Nov. Rec.]; in which case it is necessary that the [ 132 ] will of the testator be clear and distinct, L. 14. tit. 7. lib. 5. Rec. [L. 9. tit. 17. lib. 10. Nov. Rec.] Of this right of representation *Molina* speaks, lib. 1. cap. 6, 7, and 8.

4th, The line of true and absolute consanguinity by the father's side<sup>14</sup> (*cognacion*) is that by which only males are called to the succession; E. G., male to male, (*varon de varon*), or males succeed, and not females, &c.; and, in this case, every female is excluded, although she be first born, and male to male is preferred, although he may be of a more remote line or kindred, *Roxas*, Part. 1. cap. 6. § 22. Besides this, every female is understood to be excluded who might possibly impede or obstruct the succession of the *agnati*; and the woman related by the father's side, (*agnada*), through whose means the succession would pass to the *cognati*,<sup>15</sup> (*cognados*), *Molina*, lib. 1. cap. 6. num. 38, 39, and 40. It is to be observed, that by the insertion of the clause "*suceda por linea masculina*," the female daughter of the male is understood as appointed or entailed in the regular entail, (*mayorazgo regular*), but not in that of tale male, (*de agnacion*), *Roxas*, *ibid.* § 23.

5th, Tail male special (*linea de agnacion limitada*) is that in which the estate in tail male (*agnacion*) is limited to certain persons, degrees, &c., (*grados*), E. G., the descendants of Peter in tail male.

6th, The line of agnation artificial (*linea de artificiosa agnacion*) is composed of females, descendants of males.

7th, The line of quality (*linea de qualidad*) is composed of the persons who obtain the particular qualification required by the founder, E. G., of *Doctor*, &c. *Roxas*, Part 1. cap. 6. § 20.

8th, The line of simple masculinity is composed of males of any quality or condition, *Roxas*, *ibid.* § 22.

9th, The line elective comprehends the persons elected by whomsoever may have the power to elect, *Roxas*, *ibid.* § 21. This line

<sup>14</sup> Estate in tail male general.

<sup>15</sup> In the case, it is presumed, of an estate in tail female.

takes place in elective entails, when the founder authorises the last possessor or tenant to elect his successor. This election ought not to be made of a bastard. 2d, It may be changed, if it has not taken effect. 3d, It ought to be made of only one person. 4th, And when he to whom it belongs to elect, does not make his election, the succession devolves to his first-born son and the rest of the family of the founder, *Molina*, lib. 2. cap. 4., who, in cap. 5., treats whether this election must fall on the most worthy.

10th, The male line (*linea masculina*) is that which begins with [ 133 ] the male and the tail female (*feminina*); that which begins with the female,<sup>16</sup> *Roxas*, Part. 1. cap. 6. § 23. and 24.

From all that has been said, the consequence is, that, with respect to the entail constituted without rule or condition, the succession is regulated according to L. 2. tit. 15. P. 2. [L. 2. tit. 15. P. 2.]; and therefore, the females of the best line and degree are preferred to the more remote males, L. 13. tit. 7. lib. 5. Rec. [L. 8. tit. 17. lib. 10. Nov. Rec.] *Molina*, lib. 3. cap. 3.

From the perpetuity of entails it is inferred, 1st, That the succession passes to all the descendants of the founder *in finitum*, as determined by *Molina*, lib. 1. cap. 4. 2d, That the first heir or grantee named (*llamado*), must be appointed purely, and the others under the condition of the first not succeeding, *Molina*, lib. 2. cap. 12.; and therefore in the lifetime of the tenant or possessor no action can be brought, in order to its being declared who the lawful successor is, because an action will not lay for what is conditional, *Molina*, lib. 3. cap. 14. 3d, That the children or issue conditionally named, are considered appointed, for otherwise the perpetuity would fail, *Molina*, lib. 1. cap. 6. n. 2. and 3. 4th, That the word issues (*hijos*), comprehends the grandchildren and other descendants in *in finitum*, *Molina*, lib. 1. cap. 6. n. 28. 5th, That in entails the issue, &c. succeed, by right of blood, and not by hereditary<sup>17</sup> right, wherefore the possessor or tenant cannot deprive his child of the succession on account of ingratitude, *Molina*, lib. 1. cap. 9. n. 2. 6th, That a person excluded once, is not considered perpetually excluded, but suspended, while those succeed who excluded him, *Molina*, lib. 1. cap. 6. n. 22. 7th, That the proximity of relationship or kindred must be regarded with respect to the last possessor or tenant, and not the founder, *Molina*, lib. 1. cap. 6. n. 46. 8th, That the condition requiring the suc-

<sup>16</sup> *Palacios* mentions others, viz: *linea contantiva, postergada, defectiva, femenina, paterna, materna*, and says there are more; which, however, he does not particularise; but he very properly adds, that the whole only serve to afford a knowledge of the nomenclature of terms, and an understanding of what others wish to say who attempt to explain them; and that, as for any thing else, he considers the subject somewhat confused, and of little or no utility. He concludes by observing, that the will of the founder, and the laws which regulate, &c. the establishment of *mayorazgos*, are to be consulted and attended to. The 17th tit. 10th book of the Nov. Rec. treats of *mayorazgos*, which see.

<sup>17</sup> *Palacios* says (note 1.) "that this is understood, when the successor to the last possessor, or tenant, is treated of; for, that if the founder is spoken of, all succeed in respect of him, by hereditary right, since they succeed by his will and appointment."

cessors to bear the arms and the name of the family of the founder is valid; from which the conjecture of *agnation* is not inferred, *Molina*, lib. 2. cap. 14. n. 9. 9th, That all entails must be created out of, or with respect to real property, or personal, on the condition of its being sold, and real property purchased with the proceeds, *Molina*, lib. 2. cap. 10. 13th, That the dominion (*propriedad*) of the entail, cannot be confiscated for the crime of the possessor, because that would be in prejudice of the successor and of the perpetuity, unless the enormity of the crime demands that the name or remembrance of the family should be obliterated; for which reason the property of those who, under the title of levellers (*comuneros*), rose against King Charles I. was confiscated; but the usufruct [ 134 ] during the life of the possessor may be confiscated; which *Molina*, lib. 4. cap. 11., points out. 11th, That when suspicion is entertained respecting bad conduct of the possessor, he ought to give security; and if he administers improperly, and destroys the property of the entail, he is bound to restore it to the successor, *Molina*, lib. 1. cap. 15. and 16. 12th, That the possessor of the entail ought to make an inventory of the property, as being for the interest of the successors, *Molina*, lib. 1. cap. 28. 13th, That upon the death of one possessor, the civil and natural possession passes instantly to the immediate successor by benefit of law, without any act or proceeding, although another may have taken possession,<sup>18</sup> L. 8. tit. 7. lib. 5. Rec. [L. 1. tit. 24. lib. 11. Nov. Rec.], as explained by *Molina*, lib. 3. cap. 12., in which case if there arise suits for the provisional possession of the estate (*pleytos de tenuta y posesion*), the parties are to be heard within fifteen<sup>19</sup> days without its being admitted to prorogue this term, and, within it, they may make and prove their allegations, and the council decide; and the sentence being executed, a supplication (*supplicacion*), is received or allowed within forty days, the parties being bound or concluded by this last sentence, whether it be confirmatory or revocatory, L. 9. tit. 7. lib. 5. Rec. [L. 2. tit. 24. lib. 11. Nov. Rec.]; for the supplication allowed, on giving security, &c. in fifteen hundred *doblos*, by L. 14. tit. 20. lib. 4. Rec. [L. 16. tit. 22. lib. 11. Nov. Rec.] is not admitted. This sentence is understood to be to put the party in possession; for the question regarding only the property or dominion is referred to the audiencias, L. 10. tit. 7. lib. 5. Rec. [L. 3. tit. 24. lib. 11. Nov. Rec.] According to what has been laid down, suits possessory and petitory are incompatible<sup>20</sup> *Roxas*, Part. 5. cap. 5.

<sup>18</sup> Whether, the law cited says, in the lifetime, or after the death of the last tenant, or whether such tenant may transfer the possession to such person.

<sup>19</sup> L. 2. tit. 24. lib. 10. Nov. Rec. says fifty; and *Palacios* adds, that if regard be paid to L. 6. tit. 24. lib. 10. Nov. Rec., 80 days are allowed instead of 50, and that no supplication is admitted, with the exclusion of any other remedy or recourse, the proceedings only being remitted to the *audiencias* to determine on the question of property, which is borne out by the last law referred to.

<sup>20</sup> This, according to the learned Professor, is understood of suits relating to *mayorazgos*; for in other cases, possessory and petitory causes may be joined.

It is also a property of the perpetuity of entails, that no possessor can alienate the property; and this prohibition is understood, although the founder may not express it<sup>21</sup>, *Molina*, Lib. 4. cap. 1. Hence it is deduced, 1st, That neither can the possessor hypothecate, or mortgage the property, *Molina*, lib. 4. cap. 1. 2d, He cannot agree to an accord<sup>22</sup> (*transigir*), nor to an arbitration respecting it, nor grant it under lease, (*en enfiteutis*), nor let it for a long time; for all this amounts to alienation, *Molina*, L. 4. cap. 9. and lib. 1. cap. 21. n. 15. 3d, Although the possessor may not alienate the property, nevertheless he has the useful dominion (*dominio util*), *Molina*, L. 1. cap. 9. 4th, Obtaining the royal permission, the possessor may alienate this [ 135 ] property. This permission is not granted without just causes; such as the establishment of *dote* in favor of the descendants of the founder, *Molina*, lib. 4. cap. 3. n. 3. and from n. 10. to 25.; and it is lost not by making use of it during ten years, *Molina*, *ibid.* n. 49. The same author treats of this permission at length, in cap. 4, 5. and 7. of lib. 4. 5th, The possessor may grant for his life, the *usufruct* to another, *Molina*, lib. 1. cap. 20., as also let out the property, although the successor will not be bound to observe the covenant of lease which his predecessor made, *Molina*, lib. 1. cap. 21., from n. 1. to 6. 6th, The possessor ought to pay the expenses, or costs of suits, respecting the entail, *Molina*, lib. 1. cap. 27. n. 10. 7th, The improvements made in the entailed property, are free property, if they can be separated, but not those that are inseparable, as houses, castles, &c., which are an accretion to the property; so that the successor ought to pay nothing for them to the heirs having a right under the maker or founder, L. 6. tit. 7. lib. 5. Rec. [L. 6. tit. 17. lib. 10. Nov. Rec.] *Molina*, lib. 1. cap. 26. 8th, The existing, or ungathered fruits (*frudos pendientes*) must be divided between the successor and the heirs of the last possessor, *Molina*, lib. 3. cap. 11., by reason that these heirs ought to repair and make good what has been deteriorated, or the injury done by the fault of the last possessor, *Molina*, lib. 1. cap. 27. n. 1 to 5. 9th, The successor is bound for the debts which his predecessor contracted in utility of the entailed property, and with the royal permission; which rule, and its limitations, will be seen in *Molina*, lib. 1. cap. 10. from n. 15. to 28. But, if they were contracted for the personal benefit of the last tenant in tail, his successor is not bound to satisfy them, unless he is his heir, *Molina*, *ibid.* 4 n. 23. *ad. fin.*

Cap. 3. A legacy, or bequest, is a sort of gift which the testator leaves in his testament, or codicil, to some person, for the love of God or of his soul, or for the person to whom it is left to do something<sup>23</sup>, L. 1. tit. 9. P. 6.

<sup>21</sup> Subsequent enactments have determined the contrary, under certain limitations and conditions. See Ll. 16, 17, 18, 19, and 20., tit. 17. lib. 10., Nov. Rec.

<sup>22</sup> Vide *Hal. Rom. Law*, p. 95., *compromissum*, arbitration; and *transactio*, accord.

<sup>23</sup> See *Febrero Adicionado*, 1 tom. part. 1. c. 1. § 11 and 12., tit. *mandas*, from p. 113. ed. 6; or *Febrero Reformado*, 1 tom. part. 1. c. 1. § 9 and 10.: same title, p. 141. ed. 4.

§ 1. It having been before observed in the Third Title of this Book, that no one can bequeath, nor dispose, in favor of a stranger, or for the benefit of his soul, of more than the fifth of his property, if he have necessary (*forzosos*) heirs, it is evident, 1st, That if there be descendants, the legacies cannot exceed the fifth, or even the third, if it be among children, L. 11. tit. 6. lib. 5. Rec. [L. 11. tit. 6. lib. 11. Nov. Rec.] 2d, That if the necessary heirs are ascendants, the legacies may amount to the third of the property, L. 1. tit. 6. lib. 5. [136] Rec. [L. 1. tit. 6. lib. 10. Nov. Rec.] Under these rules, the doctrine of legacies will be understood; which, being conformable to the Roman law, is found collected in the 9th Title, 6th Partida<sup>24</sup>, without the necessity of repeating it here.

§ 2. The carrying into effect the legacies, and the last will of the testator, is wont to remain at the charge of the executors, (*cabeza-leros ó albaceas*.) L. 1. tit. 10. P. 6., [L. 1. tit. 10. P. 6.,] who ought to conform to the rules touched upon, when there are necessary heirs; and if the property of the testator shall not be sufficient for the payment or fulfilment of the legacies, each of the legatees must suffer a deduction, *pro rata*, L. 4. tit. 5. lib. 3. *Fuero Real*.

§ 3. Those who cannot be executors, are, 1st, The friar, L. 7.<sup>25</sup> tit. 5. lib. 3. *Fuero Real*, which differs from L. 2. tit. 10. P. 6. [L. 2. tit. 10. P. 6.] 2d, Nor the woman,<sup>26</sup> the madman, the minor,<sup>27</sup> the heretic,<sup>28</sup> the dumb, the naturally deaf, the traitor, (*traidor alevoso*), nor the person condemned to death,<sup>29</sup> L. 8. tit. 5. lib. 3. *Fuero Real*.

The executors ought to publish the testament within a month, under the penalty of losing their legacy; and, if there was none left them, of paying the tenth,<sup>30</sup> (*diezmo*.) L. 13. tit. 5. lib. 3. *Fuero Real*; and, moreover, they are obliged to fulfil the will of the testator within a year, at farthest, countable from the death of the

<sup>24</sup> Yet the citing the Roman Law is effected to be found fault with by the Spanish Law writers. See p. 3. in the preface to the text, and what is stated in p. 44. of the introduction to these Institutes, the translation of which, it is regretted, the want of time has prevented from being prefixed to the translation of the text. It is admitted that the Partidas, which are there said to be the most methodical, national, legal code known to the authors, are composed, in great part, of the Roman law. This admission was, however, quite superfluous, as the Partidas carry with them self-evident testimony of their debt to the great master code, from which they have so largely and generally borrowed.

<sup>25</sup> The quotation is erroneous, read L. 8. *ibid*.

<sup>26</sup> Although L. 8. tit. 5. lib. 3. *Fuero Real*, cited, excludes women, an addition to it says that, by custom, which is the best interpreter of laws, they may be executrices; and this seems the generally received opinion. See *Febrero* to this effect.

<sup>27</sup> Under twenty-five years of age; but again, by addition *c* to the law of the *Fuero Real*, cited, it is said that custom is, that those under twenty-five may be executors.

<sup>28</sup> This may carry a very extensive religious exclusion.

<sup>29</sup> Slaves, Moors, and Jews, complete the catalogue of those excluded from the office of executors by the same law.

<sup>30</sup> The law, which is L. 14., and not L. 13. tit. 5. lib. 3., *Fuero Real*, intended to be cited, says, the tenth of the legacy; but it is difficult to discover how a man could be compelled to pay the tenth of nothing: the later enactment, however, L. 5. tit. 18. lib. 10. Nov. Rec., presents no such difficulty, and says that, the executor having no bequest by the will, shall pay the damage to the party injured by his omission or neglect, and two thousand maravedis to the crown (*camara*).

testator; the act of one, or more, in case the whole cannot be present, (*personarlv*), being valid, L. 5.<sup>31</sup> tit. 10. P. 6. [L. 5. tit. 10. P. 6.]

If it should happen that the executors are neglectful in complying with their duty or obligation, they shall be compelled to it by the bishop; and not obeying, he shall appoint other executors,<sup>32</sup> L. 7. tit. 10. P. 6. [L. 7. tit. 10. P. 6.] In default of executors, the heir is charged with giving effect to the dispositions of the testator, L. 7. tit. 10. P. 6. Lastly, if through improper conduct or neglect, the will of the deceased be not executed, the executors shall lose what the testator may have left them, unless it be his son; for he ought not to be deprived of the lawful share (*legitima*) to which he is entitled by nature, L. 8. tit. 10. P. 6. [L. 8. tit. 10. P. 6.] See *Carpio de Executoribus Voluntatem Ultimatum*.<sup>33</sup>

<sup>31</sup> Read L. 6.

<sup>32</sup> Administrators would be more correct.

<sup>33</sup> See also *Febrero adicionado*, tom. I. part. 1. cap. 1. § 18. p. 145; or *Febrero Reformado*, tom. I. part. 1. cap. 1. § 13. p. 160., 4th edit.

Executors are of three classes: 1st, Lawful, or those entitled by law to fulfil the will of the testator. 2d, Testamentary, or those appointed by the will of the testator. 3d, *Datitios*, or those appointed by the judge or ordinary, in case of intestacy or absence of nomination by the testator, to discharge the duties of an executor, corresponding to the English administrator.

Testamentary executors are of two sorts: 1st, Universal or general, to execute entirely the testamentary dispositions, and to distribute the property of the deceased; and 2d, particular or special, appointed to carry into effect some special object or purpose of the will.

The office of executor is considered pious and private, and does not descend to the executor, or heir of a deceased executor, without express direction or leave of the appointing testator; and even then there are exceptions, especially when the executor has improperly executed his duty or trust. No person can be obliged to undertake the office of executor; but if one accepts or undertakes it expressly or tacitly, he may be compelled to discharge the duties.

According to *Febrero Adic.*, 1st vol. p. 152. n. 257., an executor is not entitled to *Salario* or remuneration for discharging his office, as a guardian is, except by the direction or declared consent of the testator; but it seems that an allowance of this nature, having reference to the trouble or duty performed by the executor, may be granted by the judge. Vide *Carpio de Exec.*, p. 81. n. 110. An executor cannot sell the real property of his testator, unless he be authorised by the will, and then it appears the sale must be by public auction. Vide L. 62. tit. 18. P. 3. It would also seem, that a bequest or legacy to an executor, is supposed to be made *contemplatione officii*, and that, therefore, if he renounce the burthen, he loses the legacy. If a legacy or bequest be left among executors, and one of them predecease the testator, or renounce the office, his share, *jure accrescendi*, is divided among the surviving or acting executors. The rule of *jus accrescendi* may seem strictly to apply to legatees. See L. 33. tit. 9. P. 6.: also *Ripia de Testam.* p. 37. n. 12.: but see also *Covarrubias*, 1 vol. c. 18. § 1. p. 125. n. 4.

In the case of there being only one executor appointed, and of his predeceasing the testator, or renouncing the office, it is to be supposed that the bequest or legacy would lapse, and go to the heir, or residuary legatee or devisee.

## TITLE VI.

OF SERVICES OR RIGHTS (SERVIDUMBRES).<sup>1</sup>

SERVICES (*servidumbres*) constitute the third right in the [ 138 ] thing. They are either real or personal; a real right or use is, the right and use which a person has in the buildings and lands of another, to make use of them for the benefit or advantage of his own, L. 1. tit. 31. P. 3. [L. 1. tit. 31. P. 3.] Personal service is, the right or use which a person gains in the things of another for the benefit or advantage of his person, and not especially of his lands or estate (*heredad*).

§ 1. Of real services, some are peculiar to cities (*urbanas*), and others to the country (*rusticas*). The first, or city services, are those which some houses have in, or with respect to others, L. 2. tit. 31. P. 3. [L. 2. tit. 31. P. 3.]; and the latter those which some estates have in, or with respect to other estates, L. 3. tit. 31. P. 3. [L. 3. tit. 31. P. 3.] Of the first kind are, 1st, The right of placing a load or burthen upon the house of one's neighbor by means of a pillar, column, beam, or other thing, which may support the building. 2d, The right of boring holes in one's neighbor's wall to place beams, or to open the windows to give light.<sup>2</sup> 3d, The right to let the water fall from one's roof, by means of gutters or spouts, upon the house of another. 4th, The right to prevent one's neighbor from building his house higher than it was at the time the right or use was created or imposed, in order that he may not obstruct one's light, view, &c. 5th, The right to have a passage through the house or yard of one's neighbors, to one's own house, and other similar rights, L. 2. tit. 31. P. 3. [L. 2. tit. 31. P. 3.] What relates to the height of buildings is governed by the municipal regulations (*estatutos*) of the towns.

Rural services are, 1st, The right of foot or horse path (*senda*), of way for narrow carts (*guia*),<sup>3</sup> and of road (*camino*). The *senda* is made use of only to go on foot or on horseback, without driving carts (*carros*) nor beasts of burthen; the *guia* to go on alone or [ 139 ] accompanied with long narrow carts (*carretas*), &c.; and the *camino*,

<sup>1</sup> Vide *Halifax, Rom. Law*, p. 25. cap. 3.; and *Wood's Inst. Civ. Law*, book 2. ch. 2. p. 145.

<sup>2</sup> *Palacios* observes upon this, what is mentioned by *Greg. Lep.* Gl. 2. L. 2. tit. 31. P. 3., that there is a difference between these two sorts of services; that in the first (*oneris ferendi*), the person benefiting by the use of his neighbor's wall, to support the burthen, is obliged to repair the wall; whereas, in the second (*tigni inimitendis*), he is not under such obligation.

<sup>3</sup> *Palacios* (note 1.) says, there is no such service as that of *guia*; but that the rural services intended to be here treated of, are "*Lasenda ó derecho de senda, la carrera*," which is called in the text *guia*, and "*La via ó camino*," which corresponds with the three rights of way of the Romans: *iter, actus, vis*.



or road to carry these and any other things on. The breadth of the road (*camino*) ought to be regulated by the agreement,<sup>4</sup> and not having been so regulated, ought to be only eight feet wide,<sup>5</sup> and sixteen, if there be a turning, L. 3. tit. 31. P. 3. 2d, The right of conducting water through another's land for the purpose of irrigation, as for mills, &c.; in which case, the person who has this right, ought to keep up, at his cost, the aqueduct, drain, pipes, or spouts, and to avoid all injury to the land through which they shall pass, L. 4. tit. 31. P. 3. [L. 4. tit. 31. P. 3.]; and the owner of the land from which the water shall be taken, cannot grant it to another, to the prejudice of him who has the right,<sup>6</sup> L. 5. tit. 31. P. 3. [L. 5. tit. 31. P. 3.] 3d, The right to drink out of the spring or well of another for one's self, laborers, and beasts of labor, or cattle, by which is also understood to be granted the right of ingress and egress to and from the land, L. 6. tit. 31. P. 3. [L. 6. tit. 31. P. 3.] 4th, The right of feeding one's beasts of labor on the meadow or pasture of another<sup>7</sup> L. 6. tit. 31. P. 6. 5th, The right of taking limestone, sand, stones, or other material, which may be found on the land of another, for the purpose of building on one's own, L. 7. tit. 31. P. 3. [L. 7. tit. 31. P. 3.], and many others of this tenor.

§ 2. Every service ought to be charged or imposed upon or with respect to things which are ours, or which we possess as ours, in order that they may be of use or benefit to the posterity<sup>8</sup> of another, L. 13. tit. 31. P. 3. [L. 13. tit. 31. P. 3.] 2d, They ought to be established by testament, by contract, or be acquired by prescription, L. 14. tit. 31. P. 3. 3d, The service is always united or annexed<sup>9</sup> to the inheritance or building upon which it was laid, and the right of using it is accessory to the thing for the benefit of which it was established, Ll. 8. and 12. tit. 31. P. 3. [Ll. 18. and 12. tit. 31. P. 3.] 4th, They are indivisible,<sup>10</sup> L. 9. tit. 31. P. 3. [L. 9. tit. 31. P. 3.]

From the first principle it follows, 1st, That every proprietor of a thing may establish a right on or with respect to it; and if there be many owners, all ought to agree either at the time of its establishment, or by subsequent approbation, L. 10. tit. 31. P. 3. [L. 10. tit. 31. P. 3.] 2d, That the tenant in fee (*feudatorio*) or for life (*poseedor á vida*) may impose a service, L. 11. tit. 31. P. 3. [L. 11. tit. 31. P. 3.] 3d, The purchaser may impose it upon the thing which he purchases, although it may not have passed into his possession with the consent of the seller, L. 11. tit. 31. P. 3. 4th, That things are not capable of services which are incapable of dominion, as sacred things, &c., L. 13. tit. 31. P. 3. 5th, That these services benefit the

<sup>4</sup> Made at the time the right was granted.

<sup>5</sup> Straightways. See L. 3. tit. 31. Part. 3., cited.

<sup>6</sup> He may grant to another the like right if there be sufficient water for both. See the exception at the end of the law cited in the text.

<sup>7</sup> Right of common or pasture.

<sup>8</sup> Or person, in the case of personal services.

<sup>9</sup> i. e. Inseparable from, except by the consent or agreement of the party entitled.

<sup>10</sup> See L. 9. tit. 31. P. 3., cited.

property of others, and not that of the person on which they [ 140 ] are established, L. 13. tit. 31. P. 3. [L. 13. tit. 3. P. 3.]

From the second principle it follows, 1st, That every continued or uninterrupted service, that is, which is continually made use of, as is running water, &c., is acquired by ten years' use of enjoyment<sup>11</sup> among persons present, and twenty among those absent; and discontinued rights which are only made use of now and then, as right of way, of road, water which comes or flows once a week, &c., cannot be acquired but by use of time immemorial, L. 25.<sup>12</sup> tit. 31. P. 3. [L. 25. tit. 31. P. 3.]

From the third principle it follows, 1st, That the service or right does not cease because the thing may change its owner and pass to another, L. 8. tit. 31. P. 3. [L. 8. tit. 31. P. 3.] 2d, That the owner of the service cannot sell nor aliene it without the thing or property to which it belongs or is attached, unless the owner of the thing which furnishes the service, or with respect to which it is exercised, should consent,<sup>13</sup> L. 12. tit. 31. P. 3. [L. 12. tit. 31. P. 3.]

From the fourth principle it follows, 1st, That if each of the heirs of the property which has the service in its favor, should wish to make use of it entirely, he can do it. 2d, That each of the heirs of the property from which the service is due, is obliged severally to render or allow it, L. 9. tit. 31. P. 3. [L. 9. tit. 31. P. 3.]

§ 2. The modes by which services are acquired being almost the same as those by which they may be lost, it follows, 1st, That the service is extinguished, by the owner of the thing to which it was granted, surrendering it to the estate or thing from which it was due, L. 17. tit. 31. P. 3. [L. 17. tit. 31. P. 3.] 2d, By the owner of the thing which is entitled to the service or right becoming owner of the thing which owes it; and if they are again separated, the service is not renewed by this event alone, L. 17. tit. 31. P. 3. 3d, By the owner of the service authorising the owner of the thing which renders it to do something which may impede the right, L. 9.<sup>14</sup> tit. 31. P. 3. 4th, By the use of the city service being impeded for ten years in the view or presence of him who possesses it, and for twenty years if he be absent,<sup>15</sup> L. 16. tit. 31. P. 3. But if the service is rural, and a continued one, it will be lost by non-use for time immemorial; and if it be a discontinued one, its non-use for the space of twenty years will be sufficient to work a forfeiture of it, L. 16. tit. 31. P. 3.

<sup>11</sup> With *buena fe*, without force, &c., on the part of him claiming, with knowledge, and without contradiction, &c., on the part of the proprietor against whom the prescription is set up. See L. 15. tit. 31. P. 3., intended to be referred to by the text, instead of L. 25, erroneously printed.

<sup>12</sup> Read L. 15; and see L. 1. tit. 17. lib. 10. Nov. Rec., as to proof, &c. of time immemorial.

<sup>13</sup> L. 12. tit. 31. P. 3., cited, mentions another exception with regard to water for irrigation; which, after brought from another's land to that of the owner of the service, may be, by the latter, granted to a third person.

<sup>14</sup> Read L. 19.

<sup>15</sup> This obstruction must be done with *buena fe*.

[L. 16. tit. 31. P. 3.] 5th, The non-use of a service common to [ 141 ] many, if it is on the part of one, does not prejudice the others; and in case they should divide among them the thing to which the service is due, he alone shall lose his right who should not make use of it, L. 18. tit. 31. P. 3. [L. 18. tit. 31. P. 3.]

Cap. 2. Personal services consist in usufruct and habitation.<sup>16</sup> Usufruct<sup>17</sup> is a right of using and enjoying all the fruits or profits of a thing<sup>18</sup> without impairing it. It is conventional, or legal, which is determined to be the usufruct the father has of the adventitious property of his child, and is explained by *Castillo de usufructu*, c. 3. The use is the right of making use of the fruits of a thing<sup>19</sup> with limitation, and without impairing it, L. 20. tit. 31. P. 3. [L. 20. tit. 31. P. 3.]

Hence it is, 1st, That the usufructuary acquires all the fruits and rents arising from the thing which was granted but the user (*usuario*) only those things which are necessary for the support of himself and his family, L. 20. tit. 31. P. 3. [L. 20. tit. 31. P. 3.] 2d, That neither the usufructuary nor the person who enjoys the use, can impair or deteriorate the thing from which they derive the usufruct or use, L. 22. tit. 31. P. 3. [L. 22. tit. 31. P. 3.], but the usufructuary is bound moreover to support and take care of it,<sup>20</sup> L. 22. tit. 31. P. 3. [L. 22. tit. 31. P. 3.]

To understand the first principle, it must be known that by fruit is understood any benefit which accrues immediately to the person, or mediately from the thing separating it from the substance, *Lagunex de fructibus*, Part. 1. cap. 2. n. 28. Thus, therefore, under the name of fruit are reckoned all the productions of the earth, of which *Lagunex*, *ibid.* Cap. 8. and Part. 2. Cap. 1. and 2. speaks. The water which takes its rise in the estate or land (*fundo*), and that which runs through it, *Lagunex*, Part. 1. Cap. 5. n. 29. and 30. 3d, The trees which are kept for the purpose of being lopped or cut, and which once cut may grow again; but not those which are not of this nature; which distinction, received among us, is explained by *Lagunex*, in Cap. 6. Part. 1. and *Castillo de usufr.* Cap. 25. 4th, The produce of cattle, the dung (*estiercol*), milk, cheese, wool, &c. Ll. 20. 21. and 23. tit. 31. Part. 3. [Ll. 20. 21. and 23. tit. 31. P. 3.] 5th, Quarries when they contribute to the benefit of the farm or estate (*fundo*),

<sup>16</sup> And *Palacios* adds use; and L. 20. tit. 31. P. 3., says, there are three sorts of personal services, although it specifies, in terms only two, usufruct and use; and comprehends, as does also L. 21. *ibid.*, under the latter term, habitation: but L. 27., same title and Partida, adopts the term, and defines it. Common, or right of common, will perhaps convey a better idea to an English reader of an use, set forth in L. 20. tit. 31. P. 3., than any other description. See 2d *Black. Com.*, 2d vol. p. 32 ch. 3.

<sup>17</sup> *Vide Halifaz*, R. L., p. 26. book 2. ch. 3.; and *Wood's C. L.*, book 2. ch. 2. p. 148 to 151.

<sup>18</sup> Belonging to another, is understood.

<sup>19</sup> Belonging to another, is also understood.

<sup>20</sup> And if the property of which the usufruct is granted should consist of cattle, &c., the usufructuary is bound, it seems, to supply the loss if any should die. See L. 22. tit. 31. P. 3., cited.

L. 27. tit. 11. P. 4. [L. 27. tit. 11. P. 4.] 6th, The penalties, fines and confiscations which arise from jurisdiction, *Lagunez*, Part. 1. Cap. 20. 7th, Annuities or rents (*censos*), *Castillo*, Cap. 41. *ibid*.

§ 2. Although he who has the use (*usuario*) receives all [142] these fruits, it must be understood, subject to the before mentioned limitation; whence it is deduced, 1st, That the person who has the use cannot sell nor rent to others the fruits as the usufructuary may do, L. 20. and 21. tit. 31. P. 3. [L. 20. and 21. tit. 31. P. 3.] 2d, That the mere use of a house being granted, it can only be inhabited by the user, his family, and any guest, but may not be rented to another,<sup>21</sup> L. 21. tit. 31. P. 3. [L. 21. tit. 31. P. 3.]

§ 3. This simple use of the house ought not to be confounded with the right of habitation or dwelling, which is wont-often to be granted; for in this last case the person to whom this habitation is granted, may inhabit the house, or rent it to whom he thinks proper,<sup>22</sup> L. 27. tit. 31. P. 3. [L. 27. tit. 31. P. 3.]

The *regalia*<sup>23</sup> of the house in which the king's household are lodged (*regalia de la Casa de aposento para la Corte*), which is very ancient in the kingdom, as appears from L. 15. tit. 9. P. 2. [L. 15. tit. 9. P. 2.], and from the whole of tit. 15. lib. 3. Rec. [Tit. 14. lib. 3. Nov. Rec.], and hath continued always under different forms, has relation to this species of habitation. King Philip III. transferred the court to Valladolid, in the year 1600, where it remained until 1610, when it was restored to Madrid, at the request of the city, and on account of the contribution or assessment (*por razon de aposentamiento*) of one-sixth of the rent on houses there, which it offered for ten years, which was reduced to two hundred and fifty thousand ducados, Aut. 4. and 4. tit. 15. lib. 3. Rec. [L. 24. tit. 14. lib. 3. Nov. Rec.]

At this day, this right is converted into a kind of annual tax (*censo*) amounting to the third part of the rents that the houses pay which are not privileged, or which have not redeemed this charge, and takes its origin from a similar assessment (*repartimiento*), to that which was made on houses of inconvenient partition (*de incomoda partition*), the owners of which labored fraudulently to be exempted from the lodging or assessment (*apostentamiento*), according to the Cedula of 25th June, 1606, [Nota 2. tit. 15. lib. 3. Nov. Rec.]

From the second principle above established, it follows, 1st, That the usufruct and the use of the land ought to be according to the custom of good husbandry (*de buen labrador*), L. 20.<sup>24</sup> tit. 31. P. 3. [L.

<sup>21</sup> Wood, in his *Institutes on the Civ. Law*, book 2. chap. 2. p. 150. says: "that if he who has the use of a house inhabits there himself, he may let out part of the house on a rent, which part would be otherwise useless to him, as being too large for his family; but this is not transferring his right, unless he too forsakes it;" and that he may receive a guest either for money or friendship.

<sup>22</sup> Which he who has only the use cannot do; but L. 27. tit. 31. P. 3., says it must be to good neighbors. See the difference between usufruct and habitation in the civil law, *Wood's Inst.*, quoted note <sup>21</sup>. The usufructuary may employ the house to other purposes than to live in it; but he that has habitation can use it no otherwise than for a dwelling.

<sup>23</sup> See tit. 15. lib. 3. Nov. Rec.

<sup>24</sup> I suppose L. 22. *ibid.* is meant.

20. tit. 31. P. 3.], so that the usufructuary shall pay for the injury (*perjuicios*) which by his fault may result to the property, *Castillo*, Cap. 23. n. 11. 2d, That the usufructuary ought to bear all the regular or ordinary expenses for the benefit of the thing, not those which are great and extraordinary, which he may claim from the [ 143 ] proprietor, and thus it appears, L. 22. tit. 31. P. 3. ought to be understood, *Castillo*, Cap. 56. and 57. 3d, That the usufructuary and the person who has the use, are to give security for the property, L. 20. tit. 31. P. 3., *Castillo*, Cap. 17. and 19. 4th, That they ought to pay the tenths (*diezmos*), and other tributes, L. 22. tit. 31. P. 3. [L. 22. tit. 31. P. 3.] 5th, These same obligations are extended to him who has the right of habitation in a house, L. 27. tit. 31. P. 3. [L. 27. tit. 31. P. 3.]

§ 4. The usufruct is put an end to, and is united with the property, 1st, By the death of the usufructuary, L. 24. tit. 31. P. 3. 2d, For not making use of the usufruct for twenty years, if absent from the place; and for ten, if therein, L. 24. tit. 31. P. 3. [L. 24. tit. 31. P. 3.] 3d, By the usufructuary alienating the right of usufruct, L. 24. tit. 31. P. 3. [L. 24. tit. 31. P. 3.] 4th, By the property being destroyed, so that it cannot produce fruit or profit, L. 25. tit. 31. P. 3. [L. 25. tit. 31. P. 3.]; in which case the usufructuary cannot renew it (*restaurarla*), without the power or authority of the proprietor. 5th, By the expiration of the period of the concession.

The usufruct being at an end, the fruits or profits gathered or received, belong to the usufructuary; and those on the ground (*pendientes*) to the proprietor;<sup>25</sup> but if they consist of pensions or annuities (*en pensiones de censos*), they shall be divided, *pro rata*, between both; because these revenues (*reditos*), are proportioned and estimated by the extension of time, *Castillo*, cap. 78.

As the usufruct cannot be perpetual unless granted for the life of the usufructuary, or for a certain time, L. 20. tit. 31. P. 3. [L. 20. tit. 31. P. 3.] the same being granted, without any limitation of time, to the corporation of a city or town, it will only last 100 years; it having been considered that, by this time, those would be dead who were alive when it was granted. The usufruct will also be at an end if the place were laid waste; but not if the inhabitants or possessors should abandon it, and go to dwell in another part, L. 26. tit. 31. P. 3. [L. 26. tit. 31. P. 3.] By these modes,<sup>26</sup> respectively, use and habitation<sup>27</sup> are at an end, Ll. 24 and 27. tit. 31. P. 3. [Ll. 24 and 27. tit. 31. P. 3.]

Cap. 3. We have hitherto spoken of the charges to which houses

<sup>25</sup> *Vide Hal. Rom. Law*, p. 26. n. 10.

<sup>26</sup> L. 24. tit. 31. p. 3., also mentions another for the completion or cessation of the usufruct, namely, the perpetual banishment or transportation of the person entitled to the usufruct.

<sup>27</sup> *Palacios (nota 1)* says, habitation, or the right of dwelling is not destroyed or put an end to by all these modes, in the same manner as an use; and refers to L. 27. tit. 31. P. 3. which says that, a person entitled to the right of habitation, can only lose it by his death, or its relinquishment, during his life-time, without force or violence.

or lands are subject by reason of service. We will now treat of the liberty or exemption which they enjoy, how another may be prevented by reason of it from making or doing anything with respect to our houses, or rather their own, from which injury may arise to our things.

§ 1. This injury (*daño*), arises either from new work or labor, or from old. New labor is every work that is newly erected or undertaken, or that is begun anew upon any old foundation wall, or other old building; by which labor or work, its ancient form or appearance is changed, L. 1. tit. 32. P. 3.; [L. 1. tit. 32. P. 3.] old labor or work is, that already built and completed, which by its antiquity threatens ruin, L. 10. tit. 32. P. 3. [L. 10. tit. 32. P. 3.]

Upon the first definition are founded these axioms. 1st, That every person whose interest it is that the new work should not be done,<sup>29</sup> may prevent it, L. 1. tit. 32. P. 3. 2d, That this prohibition [144] may be made by public or private authority,<sup>30</sup> L. 1. tit. 32. P. 3. [L. 1. tit. 32. P. 3.] 3d, That the person who builds contrary to the ancient form, may be denounced or informed against, L. 1. tit. 32. P. 3. [L. 1. tit. 32. P. 3.] 4th, That he must desist from the work, or give security to demolish what he has put up,<sup>31</sup> L. 8 and 9. tit. 32. P. 3. [L. 8 and 9. tit. 32. P. 3.]

From the first axiom we deduce, 1st, The owners or proprietors of the thing on or against which the new work is carried on, may obstruct the new work, L. 3. tit. 32. P. 3.,<sup>31</sup> [L. 3. tit. 32. P. 3.] and also those who are in the place of the proprietors, or receive particular injury in his right, as the usufructuary, the lessee (*enfiteuta*), the feudatory, and the mortgage creditor: but the usufructuary, although he cannot prevent the work, which the proprietor himself may carry on or do on the property, may require indemnification from him for any injury caused to him by the proprietor, L. 4. tit. 32. P. 3. [L. 4.

<sup>29</sup> Rather who may be damaged by its being done.

<sup>30</sup> "*Nuntiatio novi operis*." It does not appear that the Spanish law gives the party aggrieved the self remedy of abatement which our law authorises, but restricts him to his remedy at law. The strongest word made use of in L. 1. tit. 32. P. 3, is "*estorber*," which means to hinder, impede, or obstruct; but does not reach the length of the English law definition of *abate*. With regard to public or common nuisances, the right of individual abatement, without the intervention of judicial authority, may be inferred from L. 1. tit. 32. lib. 7. Nov. Rec. See 3d vol. *Blac. Com.* p. 5. ch. 1. and ch. 13. p. 216; and 4th vol. ch. 13. p. 166.

<sup>31</sup> In the event, is understood, of the right to erect, &c., being determined against him. The consequence as denounced by L. 8. tit. 32. P. 3., quoted, of the party's proceeding in the work after having been admonished to desist is that, whether such forbiddance may have been made with right or without right on the part of him making it, all the work done or erected subsequently to the prohibition, shall be pulled down by the order of the judge, at the erector's own cost and expense; such a proceeding would seem harsh, if the forbiddance had been only extra-judicially made, and the right to build or do the work was in the erector; but if, as a punishment for the party's contempt, or refusal to attend to a judicial prohibition, on a complaint or *nuntiatio* judicially preferred, the step might be warranted.

<sup>32</sup> The law cited only gives the right to every inhabitant of a town or place, except women, or children under fourteen years of age, to forbid the progress of any new work commenced without royal or corporate authority, in a street, &c.

tit. 32. P. 3.] 2d, That one who has a service (*servidumbre*), may prevent the work which obstructs or hinders his right, L. 5. tit. 32. P. 3. [L. 5. tit. 32. P. 3.] 3d, As also in the names of all the above may the son, attorney, steward, or manager, &c., L. 1. tit. 32. P. 3. [L. 1. tit. 32. P. 3.] 4th, So, likewise, may every inhabitant of a town prevent the work which is carried on or erected in any public place without the license of the corporation (*concejo*), Ll. 3. 22, 23, and 24. tit. 32. P. 3. [Ll. 3. 22, 23, 24. tit. 32. P. 3.]

5th, But if this labor or work should be done to repair or mend any thing which may be useful to the inhabitants, although some particular inconvenience may be experienced from it, it cannot be complained of,<sup>32</sup> L. 7. tit. 32. P. 3. [L. 7. tit. 32. P. 3.]

From the second axiom it is known, 1st, That the new work may be denounced<sup>33</sup> by throwing a stone against it, L. 1. tit. 32. P. 3. [L. 1. tit. 32. P. 3.] 2d, That he who has a city service, can, of his own authority,<sup>34</sup> prevent the work which may be injurious to his right; [ 145 ] and if a rural service, the authority of the judge is necessary for the purpose, L. 5. tit. 32. P. 3. [L. 5. tit. 32. P. 3.]

From the third axiom it is inferred, 1st, That the prohibition may take place against those who place on their roofs such gutters as throw the water upon the wall of their neighbor, L. 13. tit. 32. P. 3. [L. 13. tit. 32. P. 3.] 2d, Against those who raise any wall, make any inclosure, or other work on their estate or land, which impedes the current of the common water, or causes it to change its course, L. 13. tit. 32. P. 3. [L. 13. tit. 32. P. 3.] 3d, That if this injury arises from any natural event to which the act of man has not contributed; or even if the work which causes this injury has been done ten years back, with the knowledge and sufferance of the person interested, he being present; or for twenty years before, if he has been absent; or if it arises from service (*servidumbre*), the denunciation cannot, in these cases, be made, L. 14. tit. 32. P. 3. [L. 14. tit. 32. P. 3.] 4th, That if water is stopped or dammed up on any land, so that it ceases to flow and to benefit the neighboring estates, although this may arise from a natural cause, the owner of the land ought to make the water flow where it was accustomed to do, or permit the neighbors who feel the injury to do so,<sup>35</sup> L. 15. tit. 32. P. 3. [L. 15. tit. 32. P. 3.]

<sup>32</sup> Such, in point of smell, &c., as may arise from the clearing or repairing drains, sewers, &c.

<sup>33</sup> Or interdicted, and that expressly *por palabras*, as pointed out by L. 1., cited.

<sup>34</sup> This, says *Palacios* (note 2), means nothing more than that one possessed of a city service may forbid and prevent the obstruction of his right, by any of the three modes pointed out by law, L. 1. tit. 32. P. 3., which is all that L. 5., same title and Partida cited, authorises; but that a person, having a rural service, cannot, in such case, take upon himself to forbid the work, but must prefer his complaint to the judge; who, if he finds it well-founded, will order the nuisance or obstruction to be abated or removed, and the offender to make good the damage, &c., occasioned thereby, to the complaining or injured party.

<sup>35</sup> The L. 15. tit. 32. P. 3., is more qualified, and speaks of an impediment or obstruction arising gradually, *poco á poco*, from a natural cause; but *quære*, whether the same remedy would be allowed to the party who might be injured in this way by a sudden or

5th, The same rule is observed with respect to a person who purchases land on which a like detention of water shall have been formed or caused, although the vendor of such land ought to make good to the purchaser the expenses incurred by him,<sup>36</sup> L. 16. tit. 32. P. 3. [L. 16. tit. 32. P. 3.] 6th, This prohibition will also hold good against a person who opens a spring or well, maliciously, to cut off the source of the water,<sup>37</sup> L. 19. tit. 32. P. 3. [L. 19. tit. 32. P. 3.] 7th, Lastly, This new work or labor may be impeded in other cases, according as the regulations or ordinances (*estatutos*), of the towns or places may provide. This prohibition will be valid, if made to the proprietor of the work, to the superintendant of it, or to any of the workmen, Ll. 1. 2. and 8. tit. 32. P. 3. [Ll. 1. 2. and 8. tit. 32. P. 3.]

According to the fourth axiom it is evident (*se manifesta*), 1st, Because the force of this prohibition is such that, whether made lawfully or not, the work ought to be desisted from, and not prosecuted without the order of the judge, L. 8. tit. 32. P. 3. [L. 8. tit. 32. P. 3.] 2d, That prosecuting it, if the work is proceeded in without this authority, the whole of what has been done ought to be pulled down at the cost of him who ordered it to be done, L. 8. tit. 32. P. 3. [L. 8. tit. 32. P. 3.] 3d, That the prohibition is to be made with the oath of calumny, before the judge, by the party who prefers the complaint, L. 9. tit. 32. P. 3. [L. 9. tit. 32. P. 3.] 4th, That the parties [ 146 ] are to be heard on proof within three months, the work being suspended in the meantime; and after the expiration of this time, the work may be permitted to be proceeded in by the party building, on his giving security to demolish it, if judgment should be given against him, L. 9. tit. 32. P. 3. [L. 9. tit. 32. P. 3.] 5th, That the work may be continued, if he who preferred the complaint shall authorise it, L. 9. tit. 32. P. 3. [L. 9. tit. 32. P. 3.]

§ 2. Thus, as the end or object of the prohibition of the new work is, that it may not be carried on to the injury of the neighbors, in the same way, the old work is ordered to be demolished, or to be made secure, to prevent the injury which may threaten the neighbors, L. 10. tit. 32. P. 3. [L. 10. tit. 32. P. 3.]

To this principle it relates, 1st, That the owners of houses, buildings, &c., are obliged to keep them up and repair them, Ll. 24.<sup>38</sup> and 25. tit. 32. P. 3. [Ll. 24. and 25. tit. 32. P. 3.] 2d, That the buildings be constructed with such security and firmness, that if, within fifteen days<sup>39</sup> the work be cracked naturally, it is considered unsound, or not faithfully done, and the artificer obliged to rebuild it at his cost, L. 21. tit. 32. P. 3. [L. 21. tit. 32. P. 3.] 3d, That any

violent natural change of a stream. See L. 26., and other laws of the title 28., Partida 3., on natural accretions caused by rivers, &c.

<sup>36</sup> In the removal of the obstruction or injury.

<sup>37</sup> Of his neighbor's well, &c. See L. 19. tit. 32. P. 3., for which Ll. 17 and 18 are erroneously cited in the original.

<sup>38</sup> L. 24., cited, does not seem to apply.

<sup>39</sup> Read years. See L. 21. tit. 32. P. 3.



inhabitant, knowing that injury may result from the ruin of any old work, may warn the owner of it, who shall cause it to be recorded with the superintendants (*maestros*) of works,<sup>40</sup> and to be demolished, if they declare that it threatens ruin; or to give security for any injury that may happen therefrom to any neighbor; and the owner complying with neither of these requisites, the work shall be given into the possession of the neighbor, by the order of the judge, in order that he may repair it at the cost of the owner, L. 10. tit. 32. P. 3. [L. 10. tit. 32. P. 3.] 4th, That this regulation, (*providencia*,) does not take place with respect to the ruin which proceeds from a supernatural cause; and if the building be destroyed before the neighbor hath preferred his complaint; but even in this case, the owner ought to remove the stones and other materials which shall have fallen on the house of his neighbor, Ll. 10. and 11. tit. 32. P. 3. [Ll. 10. and 11. tit. 32. P. 3.] 5th, That if several are joint owners of a building, and any one of them should rebuild it in his own name, and of his partners, with their approbation, they ought to indemnify him for the expenses within four months; and not doing so, the whole of the building shall be his exclusive property; but if the work was done without the permission of his co-proprietors, or in bad faith, (*á mala fe*,) he shall forfeit or lose what he hath laid out; and the building or work shall be the common property of all, L. 26. tit. 32. P. 3. [L. 26. tit. 32. P. 3.]

<sup>40</sup> *Palacios (nota 2)* says, there is no law which imposes this obligation on the owner, although he is obliged to repair the building, or to pull it down if it is in danger of falling into ruin; or if he should not, the judge will order what is directed by L. 10. tit. 32. P. 3., according to the state of the building; and the learned Professor refers to this law for a proper explanation of this part of the text, and to *nota 5. tit. 20. lib. 7. Nov. Rec.*, which see,

## TITLE VII.

OF PLEDGES, MORTGAGES, AND RENT CHARGES, OR ANNUITIES  
(CENSOS).

THE fourth right in the thing is pledge (*prenda*) or mortgage, (*hipoteca*.) We commonly distinguish the one from the other, because the pledge (*prenda*) is of personal things,<sup>1</sup> and the mortgage (*hipoteca*) of real property, which is not delivered to the creditor. Under either term we understand all that which one person pledges or binds (*empeña*) to another for the security of the debt which he contracts, L. 1. tit. 13. P. 5. [L. 1. tit. 13. P. 5.]

§ 1. The *hipoteca* is divided into general and particular, or special. The general comprehends all the real and personal property of the debtor or mortgagor, had and to be acquired,<sup>2</sup> which may be freely mortgaged, with the exception of the things which serve in [ 150 ] his house for daily use, and are necessary for his support, (*para vivir*,) L. 5. tit. 13. P. 5.<sup>3</sup> [L. 5. tit. 13. P. 5.] The particular, or special, only comprehends that which shall be expressed, in which case, it is necessary to specify or describe the thing mortgaged, so that it may be known with certainty, L. 6. tit. 13. P. 5. *ad fin.* [L. 6. tit. 13. P. 5.] Mortgage (*hipoteca*) is also delivered into voluntary, necessary,<sup>4</sup> and tacit. The first is that which persons enter into among themselves of their own accord, mortgaging their property one to another, on account of something they ought to give or to do, L. 1. tit. 13. P. 5. [L. 1. tit. 13. P. 5.]

The second is, that which the judges shall order to be delivered to any of the parties in litigation on the property of his adversary for want of answer, or on account of contumacy or judgment that is given with respect to it, or in order to fulfil the order of the king, L. 1. tit. 13. P. 5. [L. 1. tit. 13. P. 5.]

The third is, that which is contracted silently, although nothing be said about it,<sup>5</sup> L. 1. tit. 13. P. 5. [L. 1. tit. 13. P. 5.] Of this last kind are, 1st, The mortgage which the husband has upon the pro-

<sup>1</sup> L. 1. tit. 13. P. 5. cited, defines *peño* as synonymous with *prenda*, *pignus*, a thing which a man pledges (*empeña*) to another, by delivering to him possession of it; and chiefly consists of a thing, or property, movable or personal; but in a large sense, is extended to things or property immovable or real, unaccompanied with delivery of possession. See *Wood's Inst. Civ. Law*, Book 3. ch. 2. p. 219., and *1. Browne's Civ. Law*, p. 201. Book 2. ch. 4.

<sup>2</sup> In other words, present and future property, of what nature or kind soever, with the exceptions which follow in the text.

<sup>3</sup> See the exception enumerated in this law.

<sup>4</sup> Or judicial. See the words of L. 1. tit. 13. P. 3. cited.

<sup>5</sup> Called *tacit*.

perty of the wife, or of the person who promised to endow her,<sup>6</sup> (*dotarla*), L. 23. tit. 13. P. 5. [L. 23. tit. 13. P. 5.] 2d, That which the wife acquires upon the property of the husband, by reason of the *dote* which she delivered to him,<sup>7</sup> L. 23. tit. 13. P. 5. [L. 23. tit. 13. P. 5.] 3d, That which minors have on the property of their guardians, L. 23. tit. 13. P. 5. [L. 23. tit. 13. P. 6.] 4th, That which the king has on the property of those who manage or collect his royal revenue,<sup>8</sup> (*hacienda*), Ll. 23. and 25. tit. 13. P. 5. [Ll. 23. and 25. tit. 13. P. 5.] 5th, That which the children have on the property of the father, who is the administrator of their adventitious property, L. 24. tit. 13. P. 5. [L. 24. tit. 13. P. 5.] 6th, That which the children of the first marriage have upon the property of the mother, by reason of the *arras*, or the donations given by their father to her, which she carries into the second marriage, L. 26. tit. 13. P. 5. [L. 26. tit. 13. P. 5.] 7th, That which the legatee has on the property of the testator,<sup>9</sup> L. 26. tit. 13. P. 5. [L. 26. tit. 13. P. 5.] 8th, That which the minor has on his own property, which may be sold until the price be paid him, L. 25. tit. 13. P. 5. [L. 25. tit. 13. P. 5.] 9th, That which any one has, who lends another a certain sum upon the thing for the benefit of which it is destined,<sup>10</sup> L. 26. tit. 13. P. 5.

§ 2. The mortgage ought to be given or executed by the mortgagor and mortgagee being present, although the thing or property mortgaged itself need not: but it may be also entered into or executed among persons absent by power of attorney, with or without public deed or instrument of writing (*escritura publica*),<sup>11</sup> L. 6. tit. 13. P. 5. [L. 6. tit. 13. P. 5.]; and with various conditions which be not contrary to law,<sup>12</sup> L. 12. tit. 13. P. 5. [L. 12. tit. 13. P. 5.]

[ 151 ] Every mortgage (*hipoteca*) therefore is, 1st, A right in the thing constituted for the security of the sum due. 2d, It is to be considered a species of alienation (*enagenación*). 3d, The creditor may sell<sup>13</sup> the pledge (*prenda*) unless he be paid the debt, L. 41. tit. 13. P. 5. [L. 41. tit. 13. P. 5.]

<sup>6</sup> For the amount, and until payment of the *dote*, is understood. See L. 1. tit. 13. P. 5.

<sup>7</sup> The Law 23 tit. 13. P. 5., cited, says, which he received with her.

<sup>8</sup> And for the payment of tributes or taxes, &c.

<sup>9</sup> For the value and payment of his legacy.

<sup>10</sup> e. g. the repair, or building of a ship, house, &c. And see L. 28. tit. 13. p. 5.

<sup>11</sup> In respect of Trinidad, the form, execution, and registry, &c. of all conveyances, deeds, mortgages, or contracts, regarding real property in that island, are regulated by the Proclamation of 5th February, 1814, and the Order in Council of 6th April, 1818. See Appendix O. and P.

<sup>12</sup> The covenant, or condition, that if the money borrowed should not be repaid by the mortgagor at the time agreed on, the mortgaged property shall be forfeited, or become the mortgagee's, for the amount advanced by the latter, is contrary to law, or invalid. But it is permitted to covenant, that on failure of payment of the debt at the time, the mortgagee may purchase, or have the mortgaged property at a fair valuation to be made by good men (*hombres buenos*;) it being of course understood, that the difference, if the value should exceed the debt, shall be repaid to the mortgagor. See L. 12. tit. 13. P. 5. cited; and L. 41. tit. 5. P. 5.

<sup>13</sup> This, it is apprehended, must in all cases be under regular judicial process and authority. The power of sale, on default of payment of the debt, is incident to, or rather

From the first principle we infer, 1st, That in order to acquire a right in the thing mortgaged, it is necessary that the mortgage creditor proceed with good faith, because, if he knows that the property or dominion is not in the mortgagor it will not remain obligated to such creditor, L. 7. tit. 13. P. 5. [L. 7. tit. 13. P. 5.] 2d, That in the voluntary or conventional mortgage (*prenda*) possession of the mortgagee is not necessary to create or establish the obligation, but it is otherwise with respect to the necessary or judicial mortgage,<sup>14</sup> L. 13. tit. 13. P. 5. [L. 13. tit. 13. P. 5.] 3d, That the creditor may require from the debtor and his heirs delivery (*entrega*)<sup>15</sup> of the thing mortgaged, L. 14. tit. 13. P. 5. [L. 14. tit. 13. P. 5.] 4th, That if the thing which is obligated be transferred to another by the owner, before being delivered to the creditor, he may proceed against the debtor, not molesting the possessor if he be satisfied or paid, but not being so, he will have his action to recover the thing mortgaged from him who may possess it; unless this transfer has been made after the creditor has sued the debtor, for then it is at his discretion or option to sue the debtor or the possessor of the thing mortgaged, L. 14. tit. 13. P. 5. [L. 14. tit. 13. P. 5.] 5th, That the change of situation or state of the thing mortgaged, as might happen by pulling down a house, or cultivating land, which was uncultivated, &c., does not alter the obligation of the mortgage, L. 15. tit. 13. P. 5. [L. 15. tit. 13. P. 5.] 6th, That the improvement or augmentation which the thing mortgaged receives passes together with it to the creditor if he be not satisfied; but upon being paid, he must restore the thing mortgaged with all its increase and benefit, L. 15. tit. 13. P. 5. [L. 15. tit. 13. P. 5.] 7th, That with the thing mortgaged its fruits or produce are also considered obligated; and if the creditor received them he must discount or deduct their value or amount from the capital of the debt,<sup>16</sup> Ll. 2. and 16. tit. 13.

inseparable from, a mortgage or pledge. See nota to the form of this obligation, p. 117. Part. 1. Cap. 7. § final; and p. 32. n. 34. § 4. 2d vol. *Febr. adic.* Also L. 1. tit. 19. *Fuero Real*, lib. 3. L. 42. tit. 28. Part. 5. and *Ferraris prompta Bibliotheca*, tit. *Hipoteca*, 4th vol. p. 241. n. 41.

<sup>14</sup> This must be understood of the *prætorian* mortgage, as *asentamiento*, the possession given by the judge to the plaintiff, of the defendant's property, to the amount or value of the former's demand, on account of the contumacy of the latter after citation on process; which forms the 8th Title of the 3d *Partida*, and the 5th Title, 11th Book, of the *Novisimas Rec.* thereon: but which, according to *Febrero*, *ad. vol. 2. part. 1. ch. 7. § 4. n. 56. p. 30.*, is not in use, although it is lawful, and may be resorted to; and which may, perhaps, be considered in the nature of a sequestration for contumacy, or may be understood of such right of possession as the plaintiff may be considered to have to the proceeds of the defendant's property, after levy thereon, in virtue of the writ of execution issued in satisfaction of the amount of his demand; and see *Cur. Philip.* lib. 2. *Com. Ter. ch. Hipoteca*, n. 35-37. p. 364; and the Order in Council, 6th April, 1818, Appendix P.

<sup>15</sup> See *Greg. Lopez*, Gl. 3. L. 14. tit. 13. Part. 5., cited in the text; and see 2d vol. *Febr. ad. part. 1. ch. 7. § 4. p. 34. n. 67.*; and note 13. *ante*. The word *entrega*, in Spanish legal language, often means levy made on property in virtue of an execution.

<sup>16</sup> *Palacios* (nota 2.) says, unless the husband were the creditor, and should receive the fruits of the thing mortgaged as a security for the *dote* of wife, in which case, if he sustains the burthens or charges of the marriage, he makes the fruits his own, so that he is not bound to discount their value from the capital: and that this is the opinion of *Covarrubias* *ser. cap. 1. num. 3.*; and of other interpreters.

P. 5. [Ll. 2. and 16. tit. 13. P. 5.] 8th, That although, in the conditional mortgage, or the payment of which is agreed to be at a day certain or fixed, the thing cannot be demanded until the condition be fulfilled, notwithstanding if a long absence of the debtor be apprehended, the creditor may require delivery of the thing or sureties to insure or become bound for (*que aseguren*) the mortgage or pledge, L. 17. tit. 13. P. 5. [L. 17. tit. 13. P. 5.] 9th, That the mortgage creditor has a right to assign to another the thing mortgaged to him; and upon the debt being paid, the second mortgagee will have no [ 152 ] right in the thing, but may require the assignor of the mortgage to renew the mortgage upon another thing of equal value, L. 35. tit. 13. P. 5. [L. 35. tit. 13. P. 5.] 10th, That the creditor cannot make use of the pledge or pawn (*prenda*) without the consent of the owner, and if he obtain it, then with due care, L. 20. tit. 13. P. 5. [L. 20. tit. 13. P. 5.] 11th, That if the thing mortgaged (*empeñada*), be lost or impaired by the fault of the creditor, he is bound to make good the injury, L. 20. tit. 13. P. 5. [L. 20. tit. 13. P. 5.] 13th, That this injury or damage must be discounted or deducted from the capital of the debt, L. 36. tit. 13. P. 5. [L. 36. tit. 13. P. 5.]

§ 3. From the nature and constitution of mortgage are equally deduced the modes by which it is extinguished, and they are, 1st, By the total ruin and extinction of the thing mortgaged, but not if any part of it should remain, L. 15. tit. 13. P. 5.<sup>17</sup> [L. 15. tit. 13. P. 5.], 2d, By the satisfaction or payment of the sum due, in which case the creditor must restore the pledge (*prenda*), and not doing so, he shall be compelled thereto by the judge, as also to the payment of the damages (*perjuicios*) caused by the detention, Ll. 21. and 38. tit. 13. P. 5. [Ll. 21. and 38. tit. 13. P. 5.] 3d, If the second mortgagee shall pay the debt due to the first, he shall have possession of the pledge (*prenda*), L. 22. tit. 13. P. 5. [L. 22. tit. 13. P. 5.] 4th, The right of mortgage is extinguished if one or two who mortgaged the thing satisfies the debt, or pays it to the surety,<sup>18</sup> Ll. 45. and 46. tit. 13. P. 5. [Ll. 45. and 46. tit. 13. P. 5.] 5th, By prescription; if for ten years, among persons present, and twenty among those absent, delivery of the thing mortgaged was not demanded from those in possession of it under a new mortgage<sup>19</sup> or sale executed in their favor by the owner or mortgagor, unless the latter have received it, knowing the property was already mortgaged, for then thirty years are necessary to prescribe it; and if this delivery be not demanded

<sup>17</sup> This law does not bear out the position of the text; but perhaps the authors had in mind L. 28. tit. 8. P. 5. See *Merlini Trac. de Fig. & Hip.* lib. 5. tit. 1. *Quæst.* 34. p. 602. n. 1, 2, &c.

<sup>18</sup> Who paid the debt for the mortgagors.

<sup>19</sup> *Palacios* observes, that the Law 39. tit. 13. P. 5., cited, does not say under a new mortgage, but by means of transfer (*enagenacion*), and that it is clear that, to aliene or transfer (*enagenar*), causes very different effects from to mortgage (*hipotecar*); mortgage or pledge, he adds, is not a competent cause or ground of transfer of dominion, nor, in consequence, of prescription, and refers to L. 1. tit. 11. lib. 2., *Fuero Real*, and L. 1. tit. 8 lib. 11. *Nov. Rec.*

from the owners or mortgagor of the property, or his heirs, the mortgage will be prescribed in forty years, L. 39. tit. 13 P. 5. [L. 39. tit. 13. P. 5.] 6th, The pledge (*prenda*), or mortgage (*hipoteca*) is extinguished by the debt being remitted, by parol or by writing; observing, that if the pledge is restored, the right with respect to it will be at an end, but not the debt; but if the debt is remitted, the right of mortgage is also considered remitted, L. 40. tit. 13. P. 5. [L. 40. tit. 13. P. 5.] 7th, By being tacitly (*calladamente*) remitted, which is understood if the mortgage deed (*escritura guarentigia*), is returned to the debtor without force, fear, or fraud, or is torn or cancelled by the creditor, L. 40. tit. 13. P. 5. [L. 40. tit. 13. P. 5.]

Conformably with the second principle; 1st, No person [153] can pledge (*empeñar*) nor mortgage (*hipotecar*) the thing which is not his own, L. 7. tit. 13. P. 5. [L. 7. tit. 13. P. 5.] 2d, But a person may mortgage the thing which he expects to acquire, L. 7. tit. 13. P. 5. 3d, The attorney or the steward (*mayordomo*), &c, even without permission of their principal, may pledge (*empeñar*), in which case, if the pledge (*prenda*) was delivered to the creditor, and the money received converted to the benefit or utility of the principal, the thing pledged (*empeñada*) shall remain obligated to the creditor; but if it was not already delivered, although the creditor may demand the sum due to him, he cannot demand the pledge (*prenda*), L. 8. tit. 13. P. 5. [L. 8. tit. 13. P. 5.] 4th, The thing belonging to one person may be mortgaged by another (*empeñarse*) if the owner consents,<sup>20</sup> L. 9. tit. 13. P. 5. [L. 9. tit. 13. P. 5.] 5th, The thing being once mortgaged cannot be mortgaged a second time,<sup>21</sup> except to the amount which it may exceed in value the first debt, L. 10. tit. 13. P. 5. [L. 10. tit. 13. P. 5.] 6th, He who mortgages the property already mortgaged, or does it in prejudice of a third person, shall be compelled by the judge to give a fresh or new mortgage,<sup>22</sup> and shall be even fined if he proceeded or acted from bad faith, L. 10. tit. 13. P. 5. [L. 10. tit. 13. P. 5.] 7th, Things which are out of the commerce of men<sup>23</sup> cannot be mortgaged, L. 3. tit. 13. P. 5. [L. 3. tit. 13. P. 5.] 8th, Nor can beasts used for purposes of husbandry, and this is also understood with respect to the necessary mortgage, L. 4. tit. 13. P. 5. [L. 4. tit. 13. P. 5.]; and L. 25. tit. 21. lib. 4. Rec.<sup>24</sup> [L. 15. tit. 31. lib. 11. Nov. Rec.]

From the third principle it results, 1st, That if any one should mortgage a certain thing for a certain or specific time, on its expiration, the creditor or his heirs may, by giving previous notice to the

<sup>20</sup> And afterwards confirms it; or, being present, was silent, and did not contradict or forbid it. See L. 9. tit. 13. P. 5., cited.

<sup>21</sup> Without the knowledge and permission of the first mortgagee. See L. 10. tit. 13. P. 5., cited.

<sup>22</sup> On other or unincumbered property, to the second mortgagee, and shall also be fined, at the discretion of the judge, for the fraud committed: this is the understanding of the text. See L. 10. tit. 13. P. 5., cited.

<sup>23</sup> Such as holy, sacred, or religious things, &c. See L. 3. tit. 13. P. 5., quoted.

<sup>24</sup> See also L. 6. tit. 11. lib. 10. Nov. Rec.

debtor, and with the authority of the judge, sell the thing mortgaged,<sup>25</sup> L. 41. tit. 13. P. 5. [L. 41. tit. 13. P. 5.] 2d, That if no time shall have been specified or appointed for the payment, the creditor may sell the property in nine<sup>26</sup> days after he has warned or required the debtor to pay the debt, if the property is personal, and in thirty days if it is real,<sup>27</sup> L. 21. tit. 3. lib. 6. Rec., which corrects L. 42. tit. 13. P. 5. [L. 42. tit. 13. P. 5.] 3d, He shall also be able to sell it, although an agreement for the non-alienation of the property mortgaged shall have been made, if, after having warned the debtor three times before witnesses, two years shall expire without its redemption by the debtor, L. 42. tit. 13. P. 5. 4th, This sale must be made with the permission of the judge, and at judicial public auction,<sup>28</sup> which will be better explained when we come to speak of the executive process. 5th, This sale may be prevented by the owner of the property, if [ 154 ] he should offer to pay without any delay, L. 48. tit. 13. P. 5. 6th, This sale will be null if the creditor has not permission of authority to make it, or if he make it out of time and without the solemnities mentioned; and then the owner of the property has his action to recover it from the purchaser, returning the price paid; and if it shall exceed the amount of the debt, the owner shall only have to return to the purchaser the exact amount or value of the sum that was due by him on the mortgage. This recovery of the property shall not take place, if the purchaser should prescribe it; in which circumstances the owner has his recourse against the mortgagee for the injury and damages, L. 48. tit. 13. P. 5. [L. 48. tit. 13. P. 5.] 7th, If the creditor acts with bad faith or fraud in this sale, even though he should have a right to sell the property, if the mortgagor of the thing shall prove this fraud, (*engaño*,) he shall have his action to recover the damages from the seller; and if he shall not be able to make them good, and the purchaser should have acted with equal bad faith, the mortgagor shall recover the property, together with the fruits or profits received, on returning the price, according to what has been said in the preceding section; and if there has been no bad faith on the part of the purchaser, this action against him ceases. 8th, This sale cannot be made of the real property of the *hijosdalgo* which may be mortgaged, but in this case the creditor shall be paid out of the fruits or rents, the property being adjudged to him by way of judicial or necessary pledge (*prenda*) *solutionis causâ*, L. 1. tit. 4. lib. 3. *del fuero viejo de Castilla*.

<sup>25</sup> See note 13. P. 140. *ante*.

<sup>26</sup> L. 42. tit. 13. P. 5. says twelve days.

<sup>27</sup> L. 21. tit. 13. lib. 6. Rec., is not in the *Nov. Rec.*; and, therefore, according to the *nota* to the table showing the correspondence of the laws, &c., contained in the *Recopilacion* of 1775, with those in the *Nov. Rec.*, may be considered repealed or obsolete: but *Palacios* says, that L. 21. n. 1. tit. 3. lib. 6. Rec., does not say that the property may, if movable, be sold, in such cases, in nine days; nor, if real, in thirty days; nor does it correct the law of the *Partida*, cited, as stated in the text. See Gl. 3. *Greg. Lopez*, on L. 42. tit. 13. P. 5. The sale, it is presumed, must be by the intervention of judicial authority. See note 13. P. 140. *ante*.

<sup>28</sup> See also note 13. p. 140. *ante*.

With respect to the preference among mortgage creditors, we shall treat more opportunely in the 11th Title of this Book.

§ 4. As annuities (*censo*) are inseparable from mortgage, we have thought fit to add at the end of this Title what our laws lay down with respect to this subject.

Annuity (*censos*) is a contract, by which one person sells, and another purchases the right to receive an annual pension or sum,<sup>29</sup> *Solis de Censib.* Lib. 1. Cap. 4. n. 8. For the security of this pension, the debtor obliges himself, in favor of the creditor, or of the purchaser, and gives him a mortgage on certain specified property, the general mortgage not being sufficient, *Avendaño de Censib.* Cap. 23. and 57.; whence arise two kinds of annuities, (*censos*) (setting aside others improperly such,) the "*reservativo*" and the "*consignativo*." The "*reservativo*" is when an estate or a building is given, with a covenant on the part of him who receives it, to pay a certain pension each year to the granter or giver. The "*consignativo*" is constituted by a person receiving a certain gross sum, for which he must have an annual sum or annuity, securing the capital, or sum received on real property of the same value, *Avendaño*, *ibid.* Cap. 51. These annuities may be perpetual or redeemable, [ 155 ] or for one or more lives.

As to what regards the constitution of these annuities, we are to observe, 1st, That the "*proprio motu*" of Pope Pius V. respecting annuities, is not received or observed in this kingdom, L. 10. tit. 15. lib. 5. Rec. [L. 7. tit. 15. lib. 10. Nov. Rec.] 2d, That the conditions inserted in contracts of annuity are to be observed, such as that of confiscation (*comiso*) given in case the debtor does not pay the annuity or pension, L. 1. tit. 15. lib. 5. Rec. [L. 1. tit. 15. lib. 10. Nov. Rec.]; which is understood both with respect to the annuity *reservativo* and *consignativo*, *Avendaño de Cens.* cap. 90. 3d, That the capital, or price of the annuity, ought to bear a certain proportion to the pension, which has varied, according to the times, in the following order. In 1563 it was ordered that rents of tenants, or annuitants at will (*censos al quitar*) should not be imposed under the rate of fourteen thousand for a thousand<sup>30</sup> *millar*, and to this price or rate, the antecedent ones were reduced, L. 6. tit. 15. lib. 5. Rec. [Nota 1.

<sup>29</sup> This definition does not altogether please *Palacios*, who says, (n. 1.) that if the contract is like that of purchase and sale, it also resembles that of rent or lease, (*arrendamiento*), referring to L. 28. tit. 8. P. 5.; and he gives the following definition of it: "a right to receive a certain revenue or pension, (*redito a pension*), annually, from any person, in virtue of the possession and dominion of any thing or sum which is given or transferred to him." For a fuller understanding of the subject or doctrines, he refers the reader, particularly, to *Molina de Just. et Jure*, Tract. 2.; to *Covarrubias*, 3 var.; *Res. Febrera*, Reform. ch. 20. § 1. tom. 2.; from the last of whom (n. 2. *ibid.*) he appears to have taken the above definition.

<sup>30</sup> I suppose it is meant that the annuitant should receive 1000 maravedis (for instance) annually, for every 14,000 maravedis of money or property to that value paid or transferred by him, in consideration of the *censo* to be paid to him; or in other words that an annuity of 1000 maravedis might be purchased for the gross sum of 14,000 maravedis.



tit. 15. lib. 10. Nov. Rec.]; which was extended to the annuities arising from bread, wine, &c. established in the kingdom of Galicia, Leon, Asturias, in the province of the Bierzo, and marquisate of Villena, L. 7. tit. 15. lib. 5. Rec. [L. 5. tit. 15. lib. 10. Nov. Rec.] In 1583 it was enacted or established that the annuities for one or more lives (*censos de per vida*) could only be created for a single life, by paying the principal sum in effective money, and at the rate of seven thousand maravedis for the actual return of a thousand;<sup>31</sup> those for two lives that might be already created being permitted to remain reduced to the rate of eight thousand maravedis the thousand; and those that had been established for more lives were ordered to be reduced to only two lives, L. 8. tit. 15. lib. 5. Rec. [L. 6. tit. 15. lib. 10. Nov. Rec.], *Avendaño*, cap. 33. In 1608 it was prohibited to impose a new reduction on any annuity under the rate of twenty thousand maravedis for the annual return of a thousand, and those for one life at ten thousand the thousand, and those for two lives at twelve thousand the thousand, Ll. 12. and 13. tit. 15. lib. 5. Rec. Nota 2. tit. 15. lib. 10. Nov. Rec.]; the same rule being extended to the antecedent ones by the *same nota*. In 1680 all were reduced equally to five per cent., *Auto* 4. tit. 15. lib. 5. Rec.<sup>32</sup> Lastly, in 1705, the fixed price of rents or annuities at will (*censos al quitar*) was established at thirty-three thousand maravedis and a third the thousand, which is the rule at this day; by which law all the annuities have been reduced to three per cent., *Auto* 5. tit. 15. lib. 5. Rec. [L. 8. tit. 15. lib. 10. Nov. Rec.]; which provision was extended to the whole kingdom of Aragon by *Cedula* 9th July, 1750. All the rents [156] (*reditos*) also which were accustomed to be paid in grain or corn, &c., were reduced to three per cent., *Pragmat.* 12th Feb. 1705.<sup>33</sup> [L. 9. tit. 15. lib. 10. Nov. Rec.] 4th, That the annuities, according to the style or custom of commerce, which is to give or lend money on interest at the rate of two and a half per cent. (which we may call personal annuities) are lawful, according to the *Cedula*, 10th July, 1764. [L. 23. tit. 1. lib. 10. Nov. Rec.] That rents, or annuities at will, shall not be payable in bread, wine, and other things, except money, Ll. 4. and 5. tit. 15. lib. 5. Rec. [Ll. 3. and 4. tit. 15. lib. 10. Nov. Rec.]; which provision, *Avendaño*, cap. 46., applies only to the annuity (*consignativo*). The same regulation was extended to annuities for one or more lives, L. 5. tit. 15. lib. 5. Rec. [L. 4. tit. 15. lib. 10. Nov. Rec.] 6th, That those who impose annuities on their property must declare those previously imposed, under pain of paying double the amount of the sum they shall receive from the person to whom they shall sell it, L. 2. tit. 15. lib. 5. and *Aut.* 22. tit. 19. lib. 2. Rec. [L. 2. Nota 6. tit. 15. lib. 10. Nov. Rec.] 7th, That in the principal towns of the district a book is kept for the pur-

<sup>31</sup> See note <sup>30</sup>, *ante*.

<sup>32</sup> Not in the *Nov. Rec.*

<sup>33</sup> No such is to be found in the Chronological Index of *Cedulas*, &c., to the *Nov. Rec.*

pose of noting the mortgages situate in each town of the jurisdiction, with the butts and bounds described, and the names of the persons inscribed to whom they belong, an entry being made (*tomando razon*), by the escribano of the cabildo, within 24 hours, of each instrument which may be executed with respect to an annuity, *Cedula*, 31st January, 1768, [L. 3. tit. 16. lib. 10. Nov. Rec.<sup>34</sup>] where may be seen the judicious instructions to facilitate the execution of L. 3. tit. 15. lib. 5. Rec. [L. 1. tit. 16. lib. 10. Nov. Rec.], which regards the same object. 8th, That if the possessor or tenant of two entails obtained royal permission to impose an annuity on them, and they happen to be separated, the possessor of each shall be obliged to pay the pension (*pro rata*) to avoid frauds and law-suits; and if the permission is confined to only one entail, which may be ascertained by the tenor of it, it will be at the sole burthen of the tenant who may acquire it by right of succession, *Salgado Labyrint. Credit. Part 2. cap. 9. a n. 1. ad. 25.* But if the second possessor acquired one of the entails by eviction (*eviccion*), he shall not be obliged to pay the pension or annuity (*la pension del censo*); because the first possessor or tenant, by the defect of the thing and of his person, could not impose the incumbrance or obligation (*gravamen*), *Salgado, ibid. n. 59*; nor shall that mortgage subsist, although the successor may approve of and ratify it, *Salgado, ibid. cap. 10. n. 33.*

As to what regards the redemption of the annuity, 1st, It is [157] certain that it ought to be made with effective money,<sup>35</sup> in the same way as the imposition or charge. See *Avendaño, c. 102. 106. and 107.*, by which the annuity creditor will not be considered as satisfied or paid if the debtor offer him voluntarily the capital in property or goods valued, which would not be the case in a concurso of creditors (*juicio de concurso*), *Salgado, ibid. Part I. c. 22.*<sup>36</sup> 2d, That if the debtor should form a concurso of creditors, the annuity creditor may demand the *pensions* and the *capital*, because here the redemption of the annuity (*censo*) is treated of, *Salgado, ibid. Part 1. c. 19. and 20. n. 5.* 3d, That if the nobility (*grandes titulos*), and knights (*caballeros*) shall take annuities upon their states (*estados*) with the obligation of redeeming them within a certain time, they shall enjoy double if they shall live in any place of their states, L. 66. c. 4. tit. 4. lib. 2. Rec. [L. 8. tit. 25. lib. 7. Nov. Rec.] 4th, That the towns, if there are any annuities against them, must apply two parts of the surplus of their *propios* to the redemption of them, and the third part for the payment of the arrears (*atrasos*), Decree, 23d May, 1767. [L. 14. tit. 15. lib. 10. Nov. Rec.] 5th, That if the annuity mortgage be destroyed, the annuity itself is extinguished,<sup>37</sup> *Avendaño, c. 6.*

<sup>34</sup> See Order in Council, 6th April, 1818, Appendix P.

<sup>35</sup> *Palacios* refers to Ll. 2. 22, 23, 24. *notas* 8. and 9. tit. 15. lib. 10. Nov. Rec., on this subject.

<sup>36</sup> Tom. 1. p. 176. *ad. 180.* Vide n. 33, 36, &c., and *passim*, cap. 22.

<sup>37</sup> See L. 23. tit. 8. P. 5., which says, this is not the case when one-eighth of the property is saved or left.

The annuities assigned upon the revenue of the crown. (*juros ó censos reales*), were reduced in 1727 to three per cent., *Auto* 6. tit. 15. lib. 5. Rec. [L. 4. tit. 14. lib. 10. Nov. Rec.] In 1732 the amount of the difference from five to three per cent. was appropriated to pay (*dar cabimiento á*) the royal annuities, and the residue to purchase and pay the principals, *Auto* 7. tit. 15. lib. 5. Rec.; [L. 5. tit. 14. lib. 10. Nov. Rec.] and by decree of 21st March, 1739,<sup>38</sup> this difference was applied to pay the revenues (*reditos*) of the crown at the rate of three per cent.

<sup>38</sup> Not in the Chronological Index of *Cedulas*, &c., of *Nov. Rec.*

## TITLE VIII.

## OF CONTRACTS (FACTOS) AND OBLIGATIONS IN GENERAL.

CAP. 1. HAVING treated of the right in the thing, it remains [ 159 ] for us to treat of the right to the thing; which, according to what was declared in Title I., arises from different species of obligations. Obligation is a legal tie or bond (*vinculo*) by which a person promises to do or to pay any thing. It is of two sorts, civil and natural. A civil obligation is, when he who contracts it remains bound by it in such a way, that although he should not be willing to comply with it, he may be thereby obliged and compelled to fulfil it.<sup>1</sup> A natural obligation is, when the person who enters into it is obliged to fulfil it naturally, although he cannot be compelled to its performance by a court of law (*en juicio*), L. 5. tit. 12. P. 5. [L. 5. tit. 12. P. 5.]

Some obligations arise immediately from natural or from civil equity; and others, by means of an obligatory act. This is either lawful or unlawful: the first is called convention or contract; the second, crime.<sup>2</sup>

§ 1. A covenant or promise is the undertaking which men enter into, one with another by words or parol, and with the intention of obliging themselves by agreeing upon some certain thing which they are to give or to do, to or with respect to one another, L. 1. tit. 11. P. 5. [L. 1. tit. 11. P. 5.] These covenants are divided into pacts, (*pactos*) and contracts.

Contract is, every covenant which has a name and civil cause or consideration by its obligatory nature. Pact is every covenant destitute of a name and a determinate civil cause or consideration.<sup>3</sup>

At present pacts are confounded with the stipulations of the Romans, by reason of the solemnities used among them being laid aside,

<sup>1</sup> *Palacios* says, this is called civil and natural, properly mixed, and he refers to L. 5. tit. 12. P. 5. for the definition; adding, that there are three sorts of obligations, the purely natural, purely civil, and mixed—of civil and natural, *Wood*, in his *Inst. Civ. Law*, book 3. ch. 1. p. 204., says, that a mixed obligation was the only sort that was defined by *Justinian*; which definition the learned civilian has given in the page (203), *ante* the one cited.

<sup>2</sup> *Palacios* says, a better explanation is, that obligations arise from contract and *quasi* contract; from crime and *quasi* crime; and from deliberate or solemn agreement or covenant (see L. 1. tit. 1. lib. 10. Nov. Rec.); and from some other irregular causes.

<sup>3</sup> A new covenant. *Palacios* says, "that a covenant (*convencion*), and promise (*promesa*), are not one and the same thing; and that the latter is the *stipulatio* or verbal contract of the Romans; and that there may be a promise without a covenant or agreement; as when one should make a promise, and it should not have been accepted." The above may be considered a distinction without a difference, when reference is had to what immediately follows in the text; and to L. 1. tit. 1. lib. 10. Nov. Rec.: to which last, the learned Professor, in the conclusion of his note upon this subject, also refers as the guide or governing law in Spain, in matters of covenant and pact.

neither do we admit the difference between promises of which the Roman law speaks, because amongst us every pact derives its force from the agreement and consent of the parties, which, in whatever way a person may appear to bind himself, must be observed, L. 2. tit. 16. lib. 5. Rec. [L. 1. tit. 1. lib. 10. Nov. Rec.]

§ 2. Every promise, therefore, is either valid, or void.<sup>4</sup> A valid promise may be in three ways; pure, performable, at a certain day, or conditional, L. 12. tit. 11. P. 5. [L. 12. tit. 11. P. 5.] The pure [ 160 ] promise ought to be fulfilled immediately, unless it is attended with such circumstances as may require time; as to which the judge shall determine, L. 13. tit. 11. P. 5. [L. 13. tit. 11. P. 5.]

Those promises which are made performable at a day certain do not impose an obligation until the day hath arrived; and if the person who promised it should die in the meantime, his heirs shall be obliged to fulfil it for him, L. 14. tit. 11. P. 5. [L. 14. tit. 11. P. 5.] When the promise is to give or to do a thing every year, the day on which it is to be performed is understood to be the last of each year, and the first days of each year when the promise is to give or to do it all the years of one's life, L. 15. tit. 11. P. 5. [L. 15. tit. 11. P. 5.] This certainty may consist in the day being expressly appointed or in its not being left to be verified;<sup>5</sup> in both cases the promise is valid, L. 12. tit. 11. P. 5. [L. 12. tit. 11. P. 5.] Conditional promises are not to be fulfilled, until the condition is performed, which if it precedes the promise, the fulfilment of the obligation is extended to the day of the death of the person who made the promise, L. 15. tit. 11. P. 5. *ad fin.*, excepting in the four cases mentioned in L. 16. tit. 11. P. 5. [L. 16. tit. 11. P. 5.] The promise accompanied with an impossible<sup>6</sup> condition, resolves itself into a pure one, and therefore is immediately obligatory; and the conditional one, which is contracted to be performed at a day certain, must, as well as the former, be verified in point of time, in order that the promise may be binding, L. 17. tit. 11. P. 5. [L. 17. tit. 11. P. 5.]

Any penalty may be annexed to promises or pacts in order that they may be more firm, which is called conventional if it is accessory to the agreement, and judicial if it is imposed in a suit at law (*en juicio*). The conventional penalty must be paid or satisfied if the promise is not fulfilled at the time; and this payment or satisfaction discharges from the obligation<sup>7</sup>, L. 35. tit. 11. P. 5 [L. 35. tit. 11. P. 5.] This

j <sup>4</sup> See the preceding note.

<sup>5</sup> The example put in L. 12. tit. 11. P. 5., cited in the text, on this last point is, if a man should promise that a thing or sum of money should be done or paid by his heirs on the day of his death.

<sup>6</sup> *Palacios* says that, impossible conditions render contracts null, although testaments are not vitiated thereby, except by a certain sort of impossible condition. See *Wood's Inst. Civil Law*, respecting conditions impossible, &c., p. 109. to 111., book 1. ch. 1; also p. 108., cited.

<sup>7</sup> L. 35. tit. 11. P. 5., says, that in such case, if the promise is not performed, at the time stipulated, it is at the option of the stipulator, or person to whom the promise is made, to demand the penalty, or to require the performance of the covenant.

penalty is due, although the promise may not be valid, unless it be contrary to law and good manners, L. 38. tit. 11. P. 5. [L. 38. tit. 11. P. 5.] or be to enforce the contract of matrimony, L. 39. tit. 11. P. 5. [L. 39. tit. 11. P. 5.], or usurious, L. 40. tit. 11. P. 5., [L. 40. tit. 11. P. 5.] and that the promise is not valid by being extorted through fear, force, or fraud<sup>8</sup>, L. 28. tit. 11. P. 5. [L. 28. tit. 11. P. 5.] The conventional penalty cannot comprehend all a person's property, nor exceed double the amount of the condition of the obligation or bond, L. 5. tit. 11.<sup>9</sup> lib. 1. *Fuero Real*, and L. 247. *Est*.

A promise will be void either by reason of the persons who make the promise, by reason of the things which are promised, or on account of the mode or form of agreement.

By reason of the persons, 1st, The promise that is made by the madman and the idiot, (*desmemoriado*) is not valid, L. 4. tit. 11. P. 5. [L. 4. tit. 11. P. 5.] nor that by the minor of seven years, and even of fourteen; but if it should be advantageous to the latter (*á este*), it will be valid L. 4. tit. 11. P. 5. [L. 4. tit. 11. P. 5.] 2d, Nor that made by the prodigal and the minor (*huerfano*) to their own injury, without authority of their curator,<sup>10</sup> L. 5. tit. 11. P. 5. [L. 5. tit. [161] 11. P. 5.] 3d, Nor that which is made between father and son, unless it relate to property called *castrense*, or to the obligation of dote, L. 6. tit. 11. P. 5. [L. 6. tit. 11. P. 5.] 4th, Nor the promise which is made in the name or behalf of another to a third person who is not under the power nor in the service of him in whose behalf such promise is made, except it be to the attorney, guardian, &c., Ll. 7. and 8. tit. 11. P. 5. [Ll. 7 and 8. tit. 11. P. 5.] or except the debtor, in the name of his creditor, should receive a promise from any one to satisfy the debt due by the former, in which case although he who promises is bound to the fulfilment of his promise, the creditor has no authority to demand its performance, but the debtor, who obtained the promise or obligation, L. 10. tit. 11. P. 5., [L. 10. tit. 11. P. 5.]

By reason of the things promised, a promise is not valid. 1st, When that is promised which does not exist nor can exist, or is naturally impossible to be done, L. 21. tit. 11. P. 5. [L. 21. tit. 11. P. 5.]; but if the fruits of an estate, &c., are promised, which are yet to arise,<sup>11</sup> they shall be payable the moment they are produced. And if any fraud shall be committed to impede the production, the obligation subsists or is binding by reason of the fraud, L. 20. tit. 11. P. 5. [L. 20. tit. 11. P. 5.] 2d, When holy or sacred things, &c., are promised or obliged, L. 22. tit. 11. P. 5., [L. 22. tit. 11. P. 5.] except those

<sup>8</sup> But L. 28. tit. 11. P. 5., adds, that if the penalty has been willingly paid by the party under such circumstances, he shall not recover it back.

<sup>9</sup> Tit. 18. is erroneously cited in the text; and L. 10. tit. 5. lib. 4. *Fuero Real*, contains this last provision.

<sup>10</sup> And even then the minor would, it is presumed, be entitled to his privilege or benefit of restitution, to set aside, within four years after coming of age, which is twenty-five years by the Spanish laws, such prejudicial contracts.

<sup>11</sup> The examples put by the law cited in the text, are the future or expected crops of a vineyard, or estate, the issue of a female slave, or young of cattle, &c.

things which the canon law permits. 3d, When the performance of an act by another is promised, unless it be accompanied with the obligation of the person making the promise; in which case he who makes the promise is the person bound, and not he who it was stipulated to bind or oblige.<sup>12</sup> This obligation respecting the performance of another's act also subsists, if it were imposed by the testator on his heirs; or if judicially consented to; such as is the reciprocal promise of co-guardians for the security of the property of the ward, and by which one is surety for others.<sup>13</sup> 4th, The things prohibited by law and good manners, ought not to be performed or fulfilled although they be promised,<sup>14</sup> Ll. 38 and 40. tit. 11. P. 5. [Ll. 38 and 40. tit. 11. P. 5.] There will not be found among us any covenant or pact which is invalid by reason of the form or mode<sup>15</sup> in which the obligation is contracted, because L. 2. tit. 16. lib. 5. Rec. [L. 1. tit. 1. lib. 10. Nov. Rec.] says generally, that the obligation must be fulfilled in whatever way it appears to have been agreed upon, although neither stipulation nor promise may intervene. And therefore the exterior solemnities which the Romans required for the validity of promises of which some [162] mention is made in the laws of tit. 11. P. 5., are not observed in our law by which we are enabled to say truly, that in Spain the obligation depends more on the good faith of the contracting parties, than on the solemnities of the obligatory pact which, although crude and without writing, produces an obligation, L. 1.<sup>16</sup> tit. 11. lib. 1. *Fuero Real*.

From this, other consequences very different from the Roman law may be drawn or deduced, amongst which we may remark, that where two persons are bound simply or severally (*separately*), each is only considered bound for the half, unless it shall be expressed that they have bound themselves in solidum, and each separately,<sup>17</sup> for then each may be sued for the whole,<sup>18</sup> L. 1. tit. 16. lib. 5. Rec. [L. 10. tit. 1. lib. 10. Nov. Rec.]

From what has been said, the general modes by which an obligation arising from pure pact is extinguished, may be inferred, among which may be reckoned that which proceeds from the destruction and deterioration of the thing promised, which may happen without the fault of the obligor or person obliged,<sup>19</sup> Ll. 18. and 19. tit. 11. P.

<sup>12</sup> See L. 11. tit. 11. P. 5., cited in the text; and L. 1. tit. 1. lib. 10. Nov. Rec.

<sup>13</sup> In other words, the promise or undertaking of the testator or ancestor, descends to or is obligatory on his heirs; and the bail or surety, according to his undertaking or promise, is bound for the appearance, &c., of his principal.

<sup>14</sup> *Pacta quæ turpem causam continent non sunt observanda.*

<sup>15</sup> *Palacios* says, that contracts celebrated with an impossible condition, are void or ineffectual by reason of the mode of celebrating them; that all those which may not have been celebrated with a serious and deliberate intention of producing an obligation, shall be void, on account of the mode, also of celebrating them; and he refers to L. 1. tit. 1. lib. 10. Nov. Rec.

<sup>16</sup> L. 1. is erroneously placed in the text.

<sup>17</sup> Jointly and severally.

<sup>18</sup> The same holds in the Roman or civil. See *Wood's Inst. C. L.*, book 3. ch. 3. p. 226.

<sup>19</sup> This must be taken with some limitation. See L. 18. tit. 11. P. 5., cited.

5.; [Ll. 10. and 19. tit. 11. P. 5.] and for what regards novation, solution, compensation, or set off, &c., as these modes of putting an end to the obligation are more particularly allied to loan (*mutuo*), we reserve it for Title 11.<sup>20</sup>

Cap. 2. According to our law we are to consider contracts as either innominate or nominate,<sup>21</sup> the former comprehend the four kinds of *do ut des*, &c., spoken of by L. 5. *ad fin.* tit. 6. P. 5. Of the latter, some are from pure favor (*gracia*) and affection, and others are for the mutual benefit of both parties, *pro de la*, Part. 5.

Conformably to this division, we will treat first in this book of the contracts arising from favor, and which are advantageous to only one party, such as donations, loan (*prestamo*),<sup>22</sup> deposit (*deposito*), loan called (*mutuo*),<sup>23</sup> and a commission (*montado*),<sup>24</sup> and afterwards of those which are advantageous and onerous to both parties, such as sale and purchase, leases (*arrendamientos*), partnership (*sociedad*), and exchange (*cambio ó permuta*). To these we shall add a third kind arising from those contracts, the substance and fulfilment of which depend upon chance or contingency, such as insurance (*seguro*), maritime exchange (*cambio marítimo*), and wagers (*apuestas*).

<sup>20</sup> Of this book.

<sup>21</sup> See also Wood's *Inst. Civ. L.*, book 3. ch. 1. p. 206.

<sup>22</sup> *Commodatum*. See Wood's *Inst. Civ. Law*, ch. 1. book 3. p. 215.

<sup>23</sup> See *ibid.*, p. 212.

<sup>24</sup> *Mandatum*. See *ibid.*, ch. 5. p. 242.



## TITLE IX.

## OF DONATIONS.

[ 163 ] THE first beneficial contract to one party only is donation or the benevolent act which arises from nobleness and goodness of heart, when it is made freely and without any compulsion, L. 1. tit. 4. P. 5. [L. 1. tit. 4. P. 5.] It is made in two ways, either in health or upon prospect of death; the latter is revocable, the former not, L. 7. tit. 10. lib. 5. Rec. [L. 1. tit. 7. lib. 10. Nov. Rec.]

§ 1. Hence it is, 1st, That the donation made by a person in health is a lawful pact, by reason of which the dominion of the thing given is transferred to the donee. 2d, That the donation, *causâ mortis*, has much resemblance to bequests and legacies.

According to the first principle, 1st, The minor under twenty-five years of age cannot make a gift, L. 1. tit. 4. P. 5. 2d, Nor the madman, the idiot, nor the prodigal, L. 1. tit. 4. P. 5. [L. 1. tit. 4. P. 5.] 3d, Nor the son who is under the power of his father, without his permission or consent, except of property called *castrenses* and *adventitious*,<sup>1</sup> L. 3. tit. 4. P. 5. [L. 3. tit. 4. P. 5.] 4th, Nor the person suspected<sup>2</sup> of the crime of high treason, (*læsx majestatis*;) unless he commit the offence after the donation, L. 2. tit. 4. P. 5.; [L. 2. tit. 5. P. 5.]; although persons condemned to death for other offences are considered capable of disposing of their property<sup>3</sup> which has not been confiscated, L. 3. tit. 4. lib. 5. Rec. [L. 3. tit. 18. lib. 10. Nov. Rec.]

From this principle it follows also, 5th, That the donation made between man and wife is not valid, by reason of their mutual affection, which would be an inducement for them to strip themselves of their property, L. 4. tit. 11. P. 4.; [L. 4. tit. 11. P. 4.]; the exceptions to which will be seen in Ll. 5. and 6. tit. 11. P. 4.<sup>4</sup> [Ll. 5. and 6. tit. 11. P. 4.] 6th, That donations may be made simply or purely, with condition among persons present, and by power of attorney [ 164 ] among those absent; and until a certain day, or for a limited period, Ll. 4. and 7. tit. 4. P. 5.; [Ll. 4. and 7. tit. 4. P. 5.]; which simple obligation passes to the heirs when the donor hath not delivered the thing, L. 4. tit. 4. P. 5.; [L. 4. tit. 4. P. 5.]; and the conditional one shall be fulfilled in whatever way the condition may

<sup>1</sup> And in what cases the property called *profectitious*, &c. See L. 3. tit. 4. P. 5.

<sup>2</sup> *Palacios* says, it is not sufficient that he be suspected, but it must be known that he committed the offence, and he refers to L. 2. tit. 4. P. 5., cited.

<sup>3</sup> See L. 2. tit. 4. P. 5.

<sup>4</sup> See also Order in Council, 16th September, 1822. Appendix K.

be fulfilled, L. 5. tit. 4. P. 5. [L. 5. tit. 4. P. 5.]; but the donation made for a certain day or limited period will continue only for that time, the thing given then reverting to the donor or his heirs, L. 7. tit. 4. P. 5. [L. 7. tit. 4. P. 5.]; and in the same mode the pecuniary gifts or rewards that the king shall bestow or confer are at an end,<sup>5</sup> by the death and the relinquishment or resignation (*vacacion*), of the donees, L. 20. tit. 10. lib. 5. Rec. [L. 12. tit. 5. lib. 3. Nov. Rec.]

As this liberality is often wont to degenerate into excess, it has been necessary to limit these donations, not only by prohibiting them when they are prejudicial to a third person, but also when they are so to the donor himself. For the first reason, 1st, The donation made for want of children is revoked generally if the donor shall afterwards have them, L. 8. tit. 4. P. 5. [L. 8. tit. 4. P. 5.] 2d, The donation which is made in prejudice of the lawful share (*legitima*) of children is prohibited, L. 8. tit. 4. P. 5. [L. 8. tit. 4. P. 5.]; for which reason, the gift made to the child who has brothers or sisters must come into partition, (*en colacion*),<sup>6</sup> L. 3. tit. 4. P. 5. [L. 3. tit. 4. P. 5.] 3d, Royal donations are also prohibited which are made in prejudice of the kingdom and of the crown,<sup>7</sup> such as those mentioned in Ll. 3. 10. 14. and 18. tit. 10. lib. 5. Rec.; [Ll. 8. 5. 13. 14. and 3. tit. 5. lib. 3. Nov. Rec.]; although the king may give many other things by way of remuneration for services, (*por via de merced*), such as offices, alms, (*limosnas*), insignia or badges of distinction, (*habitos*), pensions, &c., L. 5. tit. 10. lib. 5. Rec.,<sup>8</sup> L. 16. tit. 10. lib. 5. Rec. [L. 4. tit. 5. lib. 3. Nov. Rec.]; and in this last case the donees ought to obtain them from the hand of the king, L. 16. tit. 10. lib. 3. Rec. [L. 4. tit. 5. lib. 3. Nov. Rec.] These are the donations ordered to be firm and valid by L. 6. tit. 10. lib. 5. Rec.; [L. 1. tit. 5. lib. 3. Nov. Rec.]; and which are moderated according to the circumstances and state of the kingdom, L. 15. tit. 10. lib. 5. Rec. [L. 10. tit. 5. lib. 3. Nov. Rec.] 4th, The donations made to the clergy and persons privileged in fraud of the revenue or payment of taxes, (*en fraude de no pechar*), are prohibited as prejudicial to third persons, L. 11. tit. 10. lib. 5. Rec. [L. 3. tit. 7. lib. 10. Nov. Rec.]; to which the second *Auto* tit. 10. lib. 5. Rec.,<sup>9</sup> and *Auto* 1. tit. 10. lib. 5. Recop. [L. 12. tit. 5. lib. 1. Nov. Rec.] relate; where it is ordered, that for donations made to monasteries, the clergy, &c., the fifth, besides the tax of *alcabala*, be paid, and that the *ordenanza de Portugal*, which prohibits the acquisition by ecclesiastics of real property be

<sup>5</sup> At the expiration of the period for which limited.

<sup>6</sup> This is understood in so far only as the gift should exceed the *mejora* of *tercio y quinto*, which parents are allowed to assign to a particular child, beyond such child's legitimate share of their property. See Tit. 6. lib. 10. Nov. Rec. on this subject; and p. 117. ante, n. 27.

<sup>7</sup> See L. 9. tit. 4. P. 5.

<sup>8</sup> Not in the *Nov. Rec.*

<sup>9</sup> Not in the *Nov. Rec.*

[ 165 ] observed.<sup>10</sup> For the second reason, 1st, Every donation which leaves the donor without sufficient to maintain himself is prohibited, L. 4. tit. 4. P. 5. [L. 4. tit. 4. P. 5.] 2d, Also, that which comprehends the whole of a person's property even present, L. 8. tit. 10. lib. 5. Rec. [L. 2. tit. 7. lib. 10. Nov. Rec.] To both objects is L. 9. tit. 4. P. 5. directed, which enacts, that no donation exceeding five hundred maravedis of gold,<sup>11</sup> can be made without an authentic deed of writing: but the practice of the present day is, for every donation to be made with the authority of the judge,<sup>12</sup> or for his approbation to be prayed for (*se insta*) by the donee, as the person who is principally interested.

§ 3. We have said that this donation is irrevocable, because without a legitimate cause, it cannot be revoked; and this is to be the evident ingratitude of the donee towards the donor, as a motive which causes the cessation of that love which was the *mobile* (*movil*) of the donation. To this have reference the four causes expressed by L. 10. tit. 4. P. 5., and others similar, which are in force by the *Rule* 36.<sup>13</sup> tit. 34. P. 7.

§ 4. According to the second principle, bequests (*mandas*) or donations made *causâ mortis*, may be revoked during the life of the giver, as also legacies; wherefore, 1st, L. 11. tit. 4. p. 5., sets forth, principally the following three causes of revocation: 1st, the death of the donee;<sup>14</sup> second, the recovery or escape of the donor from the danger of death, the reason of which induced him to make the donation; third, the changing or altering his will. 2d, No person incompetent to make a will is permitted to make this donation, except the child,<sup>15</sup> with the consent or permission of his father, L. 11. tit. 4. P. 5.<sup>16</sup> [L. 11. tit. 4. P. 5.] 3d, As these donations are wont often to be made without the direction of that entire reason which is darkened by the fear of death, those gifts, therefore, which may have been extorted by, or may have proceeded from any *deadly* threat, will not be valid,<sup>17</sup> L. 11. tit. 4. P. 5. [L. 11. tit. 4. P. 5.]; nor those [ 166 ] which shall be made, in last sickness, to confessors, or to their churches, or monasteries, *Auto* 3. tit. 10. lib. 5. Rec. [L. 15. tit. 20. lib. 10. Nov. Rec.]

<sup>10</sup> See also n. 6. tit. 5. lib. 1. Nov. Rec.

<sup>11</sup> Vide the value of coin in note to original. A *maravedi* of gold is there said to be worth fifty reales, (suppose *de vellon*,) six *maravedis*, and something more of the then value of money, which make the sixth part of an ounce of gold.

<sup>12</sup> *Palacios* says, that the excess of any gift, above such sum, without judicial approval and authority, will be void; and he refers to *Febrero reformado*, tom. 2. P. 1. ch. 21. § 1. n. 5. and 6. p. 101., which see.

<sup>13</sup> This rule does not apply; perhaps rule 34, *ibid.* is meant.

<sup>14</sup> Add before the *donor*.

<sup>15</sup> In *patria potestate*.

<sup>16</sup> *Palacios* says, that it appears the authors infer, that a child under the father's power cannot make a testament; and although this may be the case by the civil law, and even by that of the *Purtidas*, yet by the law of the *Recopilacion* a child may make a testament, if he be of competent age, which is that of puberty, as though he were free from the *patria potestad*. L. 4. tit. 18. lib. 10. Nov. Rec.

<sup>17</sup> Or fear of being killed. See the L. 11. tit. 4. P. 5. cited.

§ 5. It may be observed that the other donations<sup>18</sup> made for a certain object or for a certain cause, into which number enter donations *propter nuptias*, remunerative donations, &c. are not valid, unless the object or cause for which they are made be certain, L. 6. tit. 4. P. 5. [L. 6. tit. 6. P. 5.]

<sup>18</sup> *Sub modo.*

## TITLE X.

## OF DEPOSIT (DEPOSITO), AND LOAN (PRESTAMO).

[ 167 ] CAP. 1. THE second contract, useful or advantageous (*util*) to one party only, is deposit, by which the person who receives does an act of kindness and affection to the person who makes the deposit, *Prol.* tit. 3. P. 5., and thus every person may deposit what belongs to him with whomsoever he pleases, L. 3. tit. 3. P. 5., [L. 3. tit. 3. P. 5.] but not things stolen, even though the deposit be made with an escribano, L. 22.<sup>1</sup> tit. 1. lib. 2. Rec., and L. 2. tit. 21. lib. 2. Rec. [L. 2. tit. 25. lib. 5. Nov. Rec.] It is called by the laws of the Partida, *condesajo*, from the old verb *condesar*, to guard or preserve, L. 1. tit. 3. P. 5., [L. 1. tit. 3. P. 5.] Deposit is when one man confides his property to the custody of another, L. 1. tit. 3 P. 5. [L. 1. tit. 3. P. 5.] It is of three sorts, 1st, When a person voluntarily and without necessity deposits the thing. 2d, When he does it through urgent necessity, in order to save the thing or property from any fire, shipwreck, &c. 3d, When the thing is deposited by the possessor to abide the event of a law suit, L. 1. tit. 3. P. 5. The first is called simple deposit; the second, miserable; and the third, sequestration.

The simple and miserable deposit, 1st, Should be kept carefully, faithfully, and without any remuneration<sup>2</sup> (*sin interes alguno*). The depositary (*depositario*) ought to restore at its time<sup>3</sup> the same thing received<sup>4</sup> to the person who deposited it (*al deponente*), L. 5. tit. 3. P. 5. [L. 5. tit. 3. P. 5.] 3d, If this fidelity (*lealtad*) be wanting by the fault<sup>5</sup> of the *depositario*, he is obliged to pay double the amount of the thing in the case of a *miserable*, and the same price or value in that of a simple deposit. From the first principle it follows, 1st, That deposit from its nature is gratuitous, L. 2. tit. 3. P. 5., [L. 2. tit. 3. P. 5.] therefore it must not bear interest even on account of gain ceasing<sup>6</sup> (*por razon del lucro cesante*), L. 15. tit. 18. lib. 5. Rec. [L. 21. tit. 1. lib. 10. Nov. Rec.] 2d, That a deposit made of any

<sup>1</sup> *Palacios* says, there is an error in the quotation of this law, (which is not in the *Nov. Rec.* and that L. 2. of tit. 21. of the same, which is L. 2. tit. 25. lib. 5. Nov. Rec. prohibits *escribanos* from receiving, in deposit, things stolen. It is presumed they would, so receiving knowingly, be punishable criminally.

<sup>2</sup> See L. 2. tit. 3. P. 5.

<sup>3</sup> That is, when it shall be demanded. See L. 5. cited, and L. 10. tit. 3. P. 5.

<sup>4</sup> The words of the text are, *en la misma especie*.

<sup>5</sup> That is, gross fault, or by fraud. See L. 2. tit. 3. P. 5. and *Gr. Lop.* Gl. 7. on ditto. also L. 8. tit. 3. P. 5.

<sup>6</sup> *Lucro cesante*, is the gain or interest which it is calculated money might produce during the time for which it is lent or unemployed. See *Curia Philipica*, lib. 2. *Com. Ter.* ch. 2: n. 3. tit. *Intereses*, p. 353, ed. 1797.

of those things which are measured, weighed, &c., on interest, is a contract which partakes more of the nature of *mutuo*<sup>7</sup> than that of deposit, L. 2. tit. 3. P. 5. [L. 2. tit. 3. P. 5.] 3d, That the depositario must be paid for the expenses which he shall incur for the. [168] benefit (*en utilidad*) of the thing deposited,<sup>8</sup> L. 10. tit. 3. P. 5. [L. 10. tit. 3. P. 5.] 4th, That the depositario neither acquires dominion nor possession in the thing deposited,<sup>9</sup> L. 2. tit. 3. P. 5. [L. 2. tit. 3. P. 5.] From the second principle it follows, 1st, That the *depositario* is obliged to return the thing whenever the person who deposited it, or his heirs, may require it, together with the fruits, rents, and improvements, without being able to retain it under pretence of set-off<sup>10</sup> (*compensacion*), or for expenses or charges<sup>11</sup> (*expensas*), &c., Lf. 5. and 10. tit. 3. P. 5., [Lf. 5. and 10. tit. 3. P. 5.] excepting in the four cases adduced by L. 6. tit. 3. P. 5. [L. 6. tit. 3. P. 5.] 2d, That the judicial depositary must not return the thing until sentence shall have been given, and the suit terminated,<sup>12</sup> L. 5. tit. 3. P. 5. [L. 5. tit. 3. P. 5.] 3d, That if a thing be deposited in a church, monastery, &c., with the consent of the superior, the whole body remains bound to restore the deposit, L. 7. tit. 3. P. 5. [L. 7. tit. 3. P. 5.]

Cap. 2. In order to understand the third principle, and every thing relating to the obligation arising from damage or injury (*daño*), in other contracts we have thought fit to explain in this place the various species of fault (*culpa*) whence this damage may result.

Damage or injury may be caused through malice<sup>13</sup> (*malicia*), or through negligence<sup>14</sup> and little care<sup>15</sup> (*poco cuidado*), or finally, by a supernatural event which we cannot prevent. To the first, the laws of the Partidas give the appellation of fraud (*engaño*), *Prol. del. tit. 16. P. 7.*, to the second that of fault (*culpa*), L. 3. tit. 3. P. 5. [L. 3. tit. 3. P. 5.]; and to the third, accident (*ocasion*),<sup>16</sup> L. 11. tit. 33. P. 7. vide *Prol. tit. 15. P. 7.* [L. 11. tit. 33. P. 7.] In all contracts, parties are first responsible for all damage caused to the thing, through

<sup>7</sup> *Palacios* observes, that L. 2. tit. 3. P. 5. does not compare nor give the title of *mutuo*, to a deposit, in which the *depositario* might receive any reward for the custody of the property, but that of letting *loguero* or *locacion*.

<sup>8</sup> But he cannot retain the deposit as a pledge or security, for the payment of such expenses. See L. 10. tit. 3. P. 5. cited, and what follows in the text.

<sup>9</sup> Unless the deposit should be of things which may be counted, weighed, or measured, and should be delivered by reckoning, weight, or measure; for, in this case, the dominion would pass to the depositary; but he would be obliged to return the money, coin, &c. deposited, or the like quantity, &c. In other words, that he would not be obliged to return the identical pieces of money, or particles of corn, but their equivalent; but it seems it would be otherwise, if the money and other things were delivered, sealed, or locked up, which would amount to a tacit prohibition of its use, and a direction to preserve it unmixed with the depositary's property, L. 2. tit. 3. P. 5. and *Greg. Lop. Gl. 4.* on said law. The doctrine in this law might give rise to important questions and the considerations it suggests are worthy of attention. See 7 tom. *Feb. Adic. P. 2. lib. 3. ch. 3. § 2. p. 101, n. 200.* and 201.

<sup>10</sup> For a debt, &c. due to him by the person who deposited.

<sup>11</sup> See note 8.

<sup>12</sup> Or the parties may have agreed. See L. 5. tit. 3. P. 5., cited.

<sup>13</sup> That is fraud. <sup>14</sup> *Lata culpa.* <sup>15</sup> *Levis culpa.* <sup>16</sup> *Causa fortuita.*

malice or fraud (*maliciosamente*), it not being allowed to covenant to the contrary. 2d, In those contracts in which we look principally for integrity of intention (*la lealtad del animo*), this fraud ought to be visited with the punishment of infamy,<sup>17</sup> L. 8. tit. 3. P. 5. [L. 8. tit. 3. P. 5.]

Accident (*ocasion*) or *caso fortuito*, which might cause any damage (*daño*), does not produce any obligation to pay or make good the damage, unless an agreement should have been made to the contrary,<sup>18</sup> L. 3. tit. 2. P. 5., *ad fin.*; and L. 4. tit. 3. P. 5. [L. 3. tit. 2. and L. 4. tit. 3. P. 5.]

Fault or negligence (*culpa*) is most small (*levissima*), small (*levis*), or great (*lata*): *culpa levissima*, means that a person did not observe that care in keeping (*aliñar*), and preserving the thing which another of good sense or understanding (*buen seso*) would have taken if he had charge of it, L. 11. tit. 33. P. 7. [L. 11. tit. 33. P. 7.] We [169] say that the thing is lost or injured through *culpa leve* when the person who has it in custody does not take all that care of it which an attentive and discreet person would, L. 3. tit. 3. P. 5. [L. 3. tit. 3. P. 5.] *Culpa lata*, as it consists of a gross and as it were inexcusable negligence, for which reason it is called in L. 11. tit. 33. P. 7. [L. 11. tit. 33. P. 4.], great and manifest fault, is compared to fraud; and thus much is to be understood from L. 2. tit. 2. P. 5. *ad fin.* [L. 2. tit. 2. P. 5.], when it makes use of these words, "unless it were allowed to be injured through fraud (*enganosamente*)."<sup>19</sup>

In order to determine and estimate the obligation which arises from each of these kinds of fault, regard must be had to the advantage (*utilidad*) or injury (*perjuicio*) which each of the contracting parties receives from the thing by reason of the contract; which doctrine is founded on these two rules, 1st, That by the contract advantageous only to one party, the person to whom it is so advantageous, is liable or bound for "*culpa levissima*," the other for only "*culpa lata, 6 engaño*." 2d, That if the advantage is equal to both parties, both are liable or bound for "*dolo y culpa leve*."<sup>20</sup>

<sup>17</sup> See in what case, by L. 8. tit. 3. P. 5. cited.

<sup>18</sup> See the other excepted cases mentioned in L. 4. tit. 3. P. 5., which are, if the *depositario* should have delayed or refused, on request, &c. is understood, to deliver the thing deposited; or should have, by his conduct, contributed to, or given cause for, the loss; or if the deposit should have been principally beneficial to the *depositario*. And see also L. 3. tit. 2. P. 5., cited; which last, however, is not applicable to the case of loan (*commodatum*).

<sup>19</sup> See *Greg. Lop.* Gl. 9. L. 2. tit. 2. P. 5.

<sup>20</sup> *Palacios* observes on this, that fraud (*dolo*) is extended to all contracts; and also, *culpa lata*; when the advantage is only with him who gives or deposits the thing, the receiver is answerable for *culpa lata*; when the advantage is only with the receiver, he is answerable for *culpa levissima*; and when the advantage is mutual, the party blameable is answerable for *culpa leve*, and he refers to L. 2. tit. 6. P. 5., which does not apply; but it is supposed this law is erroneously cited for L. 2. tit. 2. P. 5. He adds that, accident or unforeseen events, commonly called *casos fortuitos*, do not extend to, or induce liability in, any contract. This general position, laid down by the learned Professor, does not exclude a party from protecting himself against the consequences of such accidents by special covenant, as mentioned in L. 4. tit. 3. P. 5., and as in the contract of

Taking this for granted, we deduce from the third principle, 1st, That, as the fidelity or integrity (*lealtad*) of the *depositario*, consists in his taking care (*guardar*) of the thing from which he derives no advantage, he is not liable to pay the damage if it should be lost or injured through "*culpa leve*" except the contrary was agreed on, or it was deposited at his own instance or request, or that he receives interest or remuneration<sup>21</sup> for the custody or care of it, L. 3. tit. 3. P. 5. [L. 3. tit. 3. P. 5.] 2d, That much less will he be obliged to pay or make good the injury caused by *caso fortuito*, unless he should have fallen into delay or demurrage, by deferring or withholding the delivery of the thing, L. 4. tit. 3. P. 5. [L. 4. tit. 3. P. 5.] 3d, That if a person to whose charge a thing should be committed by way of *miserable* deposit, should refuse to keep it, he must pay double its amount or value, upon the truth being proved: and the *depositario* of a *simple*<sup>22</sup> deposit will be rendered infamous, and shall be obliged to restore the deposit, and make good the loss (*perjuicios*), damage (*daños*) &c. to be estimated by the oath of the person depositing, and settled by the authority of the judge, L. 8. tit. 3. P. 5. [L. 8. tit. 3. P. 5.]

As to what relates to judicial deposit, it is to be observed, 1st, That in the *audiencias* and courts of justice, (*juzgados*), there ought to be kept a book, in which deposits are to be enrolled, Lib. 23. tit. 2. lib. 2. Rec.<sup>23</sup> 2d, That the *depositario* should render accounts annually to the judges, Aut. 21. tit. 14. lib. 2. Rec. [Nota 8. tit. 14. lib. 4. Nov. Rec.]

Sequestration (*el sequestro*) belongs to the subject of suits [170] or actions, (*al tratado de juicios*), as appears from Tit. 9. P. 3. [Tit. 9. P. 3.]

Cap. 3. The third contract advantageous to only one party is loan, (*prestamo*),<sup>24</sup> which is a sort of contract that men make with one another, some lending to others their property when they have occasion or necessity for it, L. 1. tit. 1. P. 5. [L. 1. tit. 1. P. 5.] This loan is either made gratuitously, or on the condition of a certain price being paid for its use.<sup>25</sup> That which is gratuitous, is either of things which are weighed, measured, or counted, which is called *mutuo*; or it is of things which cannot be weighed nor counted, for a certain use, and then it is called "*commodato*," or of things to be

insurance. On the subject and degrees of *culpa* or neglect, by the civil law, corresponding with what has been said in the text, and observed upon in this note by the learned Professor cited, see *Wood's Inst. Civ. Law*, book 1. ch. 1. P. 106, 107.

<sup>21</sup> See *Greg. Lop.* Gl. 12. L. 3. tit. 3. P. 5.

<sup>22</sup> The *Daños* here understood, observes *Palacios*, according to the same law cited in the text, are those which have arisen because the deposit was not returned when demanded, but not on account of what might have been gained by the thing or property deposited. See Gl. 9. *Greg. Lop.* on L. 8. tit. 3. P. 5., cited.

<sup>23</sup> Not in the *Nov. Rec.*

<sup>24</sup> *Mutuum*. See *Wood's Inst. Civ. Law*, book 3. ch. 1. p. 212. and 213.

<sup>25</sup> *Palacios* says, that loan (*prestamo*) is by its nature gratuitous, and if a price should be introduced, it would not be a loan, but some other kind of contract; and refers to L. 1. tit. 2. P. 5.; and § 2. *Inst. quib. mod. re cent. oblig.*



used at the will or discretion (*al arbitrio*) of the person who lends, and then it is called *precarious* loan (*precario*).

§ 1. *Commodato*<sup>26</sup> is a sort of loan that men make to one another, by which the receiver or borrower is to be benefited for a certain time, L. 1. tit. 2. P. 5. [L. 1. tit. 2. P. 5.] "*Commodato*" may be made, 1st, Gratuitously, and for the advantage only of the receiver, as when a horse is lent, &c. 2d, For the utility or advantage equally of the lender, which will be always the case when the thing lent serves also the lender. 3d, When the thing is lent more for the honor and satisfaction of the lender than of the borrower, of which kind is the loan of a person's clothes or jewels to the wife, in order to appear more elegant, L. 2. tit. 2. P. 5. [L. 2. tit. 2. P. 5.]

Hence are deduced these three axioms, 1st, That "*commodato*" is made for a certain and determinate use. 2d, That the same thing which is lent must be returned.<sup>27</sup> 3d, That this contract is, from its nature, advantageous to the borrower. From the first axiom it results, 1st, That until the use or the time appointed for which it was lent be completed, the thing cannot be demanded; because until then the borrower is not obliged to return it, L. 9. tit. 2. P. 5. [L. 9. tit. 2. P. 5.] 2d, That the time or the use for which it was intended having been completed, it ought to be restored to the owner or heir of the lender, without its being allowed to be retained by way of set off, (*compensacion*), or on account of debt, L. 4.<sup>28</sup> tit. 2. P. 5. [L. 4. tit. 2. P. 5.] 3d, That if it is not restored to the owner, the borrower is liable for the expenses, damages, and prejudices which he occasioned by the delay, L. 9. tit. 2. P. 5. [L. 9. tit. 2. P. 5.]

[ 171 ] From the second axiom it arises, 1st, That every thing corporeal or incorporeal, personal or real, belonging to another,<sup>29</sup> or to one's self, may be lent, L. 2. tit. 2. P. 5. *ad fin.* [L. 2. tit. 2. P. 5.] 2d, That the things which are consumed by use are only lent for pomp and luxury, of which kind L. 2. tit. 2. P. 5. [L. 2. tit. 2. P. 5.] makes mention. 3d, That the borrower ought to take more care of the thing lent than of his own, which is called being liable for all

<sup>26</sup> See Wood's *Inst. Civ. Law*, book 3. ch. 1. p. 215.

<sup>27</sup> The text says, the thing lent must be returned "*en la misma especie*;" but it is thus translated, to convey what is thought to be the meaning of the text; for one of the differences between a *commodatum* and a *mutuum*, is, it is apprehended, that with regard to *commodatum*, the same thing is to be returned, and not the same quantity or quality as in a *mutuum*. See L. 2. tit. 1. P. 5.; and L. 9. tit. 2., *ibid.* See also the following title in the text; and such is the case by the civil law. See Wood's *Inst. C. L.*, p. 215., cited in the preceding n. 26.

<sup>28</sup> It is supposed this law is erroneously cited for L. 9. *ibid.*, before quoted, which contains an exception to the general position in the text, in the case of the debt having been contracted for the benefit of the *commodatum*, after it was lent, and the expense laid out on it was necessary.

<sup>29</sup> With such person's authority, must be understood, it is presumed. See L. 2. tit. 1. P. 5. *Palacios*, in a note on this, observes that, L. 2. tit. 1. P. 5. only permits the loan by a person of a thing which is his own; and that L. 2. tit. 2. P. 5., does not permit the loan by one of another's property. It is conceived, that the text meant to convey by the expression used, no more than is stated in the first part of this note.

*fault*, even "*levissima*;" but not for accidents (*acasos*) nor supernatural events, except they should happen after the expiration of the time for which the thing was lent, or it should have been applied to another use or purpose than that for which it was lent,<sup>30</sup> L. 3. tit. 2. P. 5. [L. 3. tit. 2. P. 5.] 4th, That the thing ought to be sent to the owner by a trusty and confidential person; because, otherwise, the borrower is responsible for the damage or loss;<sup>31</sup> but if it be delivered to any one who was sent for the purpose by the owner, it is at his risk from the instant of its delivery, L. 4. tit. 2. P. 5. [L. 4. tit. 2. P. 5.] 5th, That if a thing be lent to many, each is responsible for his part, unless each binds himself for the whole. Also the heirs of the borrower, if, by their fault,<sup>32</sup> they shall lose it, shall pay *pro rata*, L. 5. tit. 2. P. 5. [L. 5. tit. 2. P. 5.] 6th, That if the value of the loan hath been paid in consequence of its being considered lost, and it shall afterwards be found by the owner, he must deliver it to the borrower, or may retain it on returning the price or value which he shall have received; but if a third person should find it, the borrower has his action to recover it from him, L. 8. tit. 2. P. 5. [L. 8. tit. 2. P. 5.]

From the third axiom it is deduced, 1st, That the owner must make known the vice or defect of the thing lent<sup>33</sup>, L. 6. tit. 2. P. 5. [L. 6. tit. 2. P. 5.] 2d, That the borrower must support, at his own expense, the beast which may be lent to him, and if it shall fall sick without his fault, he is entitled to recover what he shall expend in its cure, L. 7. tit. 2. P. 5. [L. 7. tit. 2. P. 5.] 3d, That if the owner is equally benefited, by the thing lent, the borrower is only liable for "*culpa leve*;" which is understood of *commodato*, or loans of the second kind:<sup>34</sup> and with respect to the third kind, the borrower is liable for the damage which may arise from *dolo* or malice (*malicia*).<sup>35</sup>

<sup>30</sup> Or unless there should have been a special covenant to the effect. See L. 3. tit. 2. P. 5.

<sup>31</sup> See *Greg. Lop.* Gl. 1. on L. 4. tit. 2. P. 5., cited.

<sup>32</sup> Or if it hath been lost by the fault of their ancestor or testator.

<sup>33</sup> Such as the dishonesty of a slave, &c.: for concealment by the owner or lender, with knowledge of the vice, &c., renders him responsible to the borrower for the consequences of dishonesty, &c. See L. 6. tit. 2. P. 5. cited, and *Greg. Lop.* Gl. 1. and 2. *ibid.*

<sup>34</sup> See pp. 179, 180, ante.

<sup>35</sup> *Culpa lata*.

## TITLE XI.

## OF LOAN (EMPRESTITO OR MUTUO), AND OF DEBTS (DEUDAS).

CAP. 1. THE other species of loan of which we have to treat, is *emprestito*, which may be considered as a thing that is lent at the request of the borrower, L. 1. tit. 1. P. 5. The thing lent must be of a quality which can be weighed, measured, or counted. Wherefore the contract of *emprestito*, is that by which the thing that is consumable [173] (*cosa fungible*), is transferred to the dominion of another under the obligation or condition of returning the like quantity in kind<sup>1</sup> as is deduced from L. 1. and 2. tit. 1. P. 5. [L. 1. and 2. tit. 1. P. 5.]

Hence it is that "*mutuo*" can only be made of those things which consist of number, weight and measure. 2d, That this contract can only be valid on delivery of the thing. 3d, That it has the quality of alienation (*enagenacion*). 4th, That the debtor is bound to return to the creditor, an equal value or quantity of the same thing as that received or that which might be agreed on. From the first principle it follows, 1st, That the only objects of "*emprestito*" or *mutuo*<sup>2</sup> can be money, oil, corn, &c., L. 1. 2. and 8. tit. 1. P. 5. [L. 1. 2. and 8. tit. 1. P. 5.] 2d, That the other things belong more properly to "*commodato*," L. 1. tit. 1. P. 5. [L. 1. tit. 1. P. 5.]

From the second principle it results, 1st, That the pact or promise to lend does not make the person liable, who declares to have received the thing, unless two years pass after the execution of the instrument of writing, containing such declaration, or if it should be proved by the lender, that he really delivered the thing,<sup>3</sup> although in the present day the renunciation of the exception *non numerata pecunia*, L. 9. tit. 1. P. 5. [L. 9. tit. 1. P. 5.] is an usual clause in deeds. 2d, That the obligation of the "*emprestito*," is binding or complete, inasmuch, or as far as delivery is made of the thing by its owner, or by another in his name, L. 2. tit. 1. P. 5. [L. 2. tit. 1. P. 5.]

From the third principle it is inferred, 1st, That the property

<sup>1</sup> See *Wood's Inst. Civ. L.* p. 212, 213, before referred to.

<sup>2</sup> Which are not such as are weighed measured, or counted.

<sup>3</sup> *Palacios* very justly observes that it is necessary to refer to L. 9. tit. 5. P. 5., cited further or in the text, for a proper understanding of what is desired to be conveyed by the text. The substance of which is, that if a person, under the expectation of receiving a promised loan, executes a deed or instrument acknowledging the receipt of such promised loan, which, in point of fact, hath not been paid or delivered, and allows two years to pass by without claiming to be relieved against his act or to have the instrument delivered up or cancelled, if he be sued, after the expiration of that time, on the deed, for the repayment or return of the thereby admitted loan, he will be liable for the amount. The renunciation in the deed of the exception *non numerata pecunia*, mentioned in the succeeding sentence of the text, produces the like liability, even though the plea of non-receipt of such promised loan should be preferred before the expiration of the two years.

(*senorio*) of the thing lent (*emprestito*) passes to the person who receives it, L. 2. tit. 1. P. 5. [L. 2. tit. 1. P. 5.] 2d, That the debtor or borrower remains bound or liable for the thing in whatever way, or by whatever cause it may be lost or destroyed, L. 10. tit. 1. P. 5., [L. 10. tit. 1. P. 5.] by reason of its being at his own risk. 3d, That those persons may lend who are able to alienate their property.

From the fourth principle it arises, 1st, That a loan can be made to the person only who is capable of being bound, or of binding himself; but if the loan "*emprestito*," should be made to a church, city, town, to the king, or to another in his name, in order that either may be bound or liable, it is necessary for the creditor to prove the loan to have been converted to their benefit, L. 3. tit. 1. P. 5. [L. 3. tit. 1. P. 5.] But if the person sent in the name of the king demands a credit in virtue of a sufficient power which he may produce for the purpose, the king ought to pay the debt, whether it be or not to his advantage, L. 3. tit. 1. P. 5. [L. 3. tit. 1. P. 5.] 2d, That the child under the paternal power (*el hijo de familias*) cannot take any thing upon credit,<sup>4</sup> L. 22. tit. 11. lib. 5. Rec., [L. 17. tit. 1. lib. 10. Nov. Rec.] which furnishes a clue to come at the right or true meaning of Ll. 4. 5. and 6. tit. 1. P. 5. [Ll. 4. 5. and 6. tit. 1. P. 5.] 3d, That one who conducts a shop, or business in the name of another, obliges [ 174 ] or binds his principal for what he borrows by his authority or order, for the benefit<sup>5</sup> of the business or concern, L. 7. tit. 1. P. 5. [L. 7. tit. 1. P. 5.] 4th, That the thing lent ought to be returned at the time, place, and in the kind agreed upon; and if no time hath been expressed, restitution must be made within ten days, Ll. 2. and 8. tit. 1. P. 5. [Ll. 2. and 8. tit. 1. P. 5.]; and if the payment hath been made in money, the thing must be valued if it should not be otherwise agreed on, according to what it should be worth, in the place and at the time it shall be sued for, L. 8. tit. 1. P. 5. [L. 8. tit. 11. P. 5.]

Cap. 2. The obligation of loan (*emprestito*) and of every other debt is extinguished or discharged, 1st, By payment which is made to him who is to receive it, so that he is paid for it, L. 1. tit. 14. P. 5. [L. 1. tit. 14. P. 5.]

§ 1. Hence it is, 1st. That whoever pays, discharges the obligation, L. 2. tit. 14. P. 5. [L. 2. tit. 14. P. 5.] 2d, That payment should be made in the manner it was agreed upon; but if the debtor is not able to pay the same thing he promised, he shall pay with other things, obtaining, therefor, the sanction of the judge,<sup>6</sup> L. 3. tit. 14. P.

<sup>4</sup> *Pelacios* says that the effect, if any credit or loan should be given or advanced, is, that no one could demand or recover it, neither from the minor, nor the person to whose power such child might be subject. He is borne out in this position by L. 17. tit. 1. lib. 10. Nov. Rec.; which, in effect, seems to subvert or repeal all the provisions in Ll. 4. 5. and 6. tit. 1. P. 5., respecting the liability of such minors, &c. See those laws, and also L. 17. tit. 1. lib. 10. Nov. Rec.

<sup>5</sup> If for such benefit the principal is liable, even in the absence of any authority or order. See L. 7. tit. 1. P. 5., cited.

<sup>6</sup> Or without it, if the creditor should consent, L. 3. tit. 14. P. 5., cited.

5. [L. 3. tit. 14. P. 5.] 3d, That the payment which is made by a debtor, or by another in his name, even though it be against the will of the debtor, is valid, L. 3. tit. 14. P. 5. [L. 3. tit. 14. P. 5.] 4th, That it must be made to the creditor or to his attorney, Ll. 5. and 7. tit. 14. P. 5. [Ll. 5. and 7. tit. 14. P. 5.] 5th, That if the creditor be a minor, payment must be made to him under the authority or sanction of the judge, in order that the debt may be extinguished or discharged, L. 4. tit. 14. P. 5. [L. 4. tit. 14. P. 5.] 6th, That the payment being lawfully made, the debtor is exonerated and discharged, as are also his sureties, mortgages and heirs, L. 1. tit. 14. P. 5. 7th, That if a person be indebted on many accounts, or owe many debts to one person, and pay him something, it is to be understood (though not expressed) that he pays an equal proportion in discharge of all the debts,<sup>7</sup> unless that one of them be more onerous (*mas gravosa*)<sup>8</sup> than the others; in which case the payment is understood to be made in discharge of it, L. 10. tit. 14. P. 5. [L. 10. tit. 14. P. 5.] The mode in which payment should be made to the father,<sup>9</sup> to the monk, &c., is treated by *Salgado Labyrint. cred.*, Part 1. cap. 27.

It often happens that a person pays what is not due through error or ignorance. These payments are null, and what has been paid must be returned, upon proving the error or mistake, L. 28. tit. 14. P. 5. [L. 28. tit. 14. P. 5.] This proof must be given by the plaintiff, the defendant confessing the payment; and if he deny it, it will be [ 175 ] sufficient for the plaintiff to prove having made the payment, in order to be entitled to recover.<sup>10</sup> But if the plaintiff should be a minor under twenty-five years, a woman, a simpleton (*sencillo*), a laborer, or military person, and the defendant acknowledge the payment, the latter must prove it to have been lawfully made, L. 29. tit. 14. P. 5.

On all that has been said, it is established, 1st, That whoever paid what he knew he did not owe, cannot recover it back, unless he were a minor, L. 30.<sup>11</sup> tit. 14. P. 5. [L. 30. tit. 14. P. 5.] 2d, That what is paid through ignorance of law, cannot be recovered back, because we are all obliged to know the laws of the kingdom,<sup>12</sup> from the study of which only military persons, women, laborers,<sup>13</sup> minors, &c., are exempted, L. 31. tit. 14. P. 5. [L. 31. tit. 14. P. 5.] 3d, That if payment is made of a debt which was not justly due in consequence of a sentence of the judge, it cannot be recovered back, unless it be

<sup>7</sup> *Palacios* says, provided all should be equally long due, and of the same class; for if not, the payment should be applied in discharge of that which was first due, and he cites *Greg. Lop.* Gl. 4. L. 10. tit. 14. P. 5.

<sup>8</sup> By reason of the existence of a penalty for non-payment of the debt bearing interest, &c. See L. 10. tit. 14. P. 5., cited.

<sup>9</sup> On account of his son.

<sup>10</sup> Unless the defendant should prove that the payment was made because it was justly due to him, L. 29. tit. 14. P. 5.

<sup>11</sup> L. 3. is erroneously cited in the original

<sup>12</sup> See also L. 20. tit. 1. P. 1.

<sup>13</sup> The law cited, L. 31. tit. 14. P. 5., says, simple laborers.

proved that the sentence was given through false instruments,<sup>14</sup> L. 33. tit. 14. P. 5. 4th, That the possessor of an estate under good faith, may deduct from the estate what he shall have paid or incurred on account of it, L. 36. tit. 14. P. 5. [L. 36. tit. 14. P. 5.] 5th, That if a person who is obligated to deliver one of two things,<sup>15</sup> should deliver or pay both through error, he may recover back which of the two he thinks fit,<sup>16</sup> L. 39. tit. 14. P. 5. [L. 39. tit. 14. P. 5.] 6th, That the tradesman or artificer shall recover his charges from the person for whom he performed any work, under a supposition<sup>17</sup> that he was obliged to do it, L. 40. tit. 14. P. 5. [L. 40. tit. 14. P. 5.] 7th, That if the thing which is delivered through error of fact, should yield fruits, it must be returned together with them; and if the person who received it under bad faith (*con mala fe*), should sell or lose it, he is obliged to restore the price according to the valuation of the judge; but if he were a possessor, "*de buena fe*," he is only bound to the restitution in the case of selling it, L. 37.<sup>18</sup> tit. 14. P. 5. [L. 37. tit. 14. P. 5.]

This action for the recovery of what hath been paid through error, which the Romans called *condictio indebiti*, ought not to be confounded with other actions, because whoever for a certain honest object, and not through error, pays or delivers that which he promised, may recover it back, if the condition or object on or for which it was paid or delivered is not fulfilled, Ll. 41. 43, 44. and 46. tit. 14. P. 5. [Ll. 41. 43, 44. and 46. tit. 14. P. 5.]; and he who delivered something for any indecorous or disgraceful object<sup>19</sup> on the part only of the person who receives it, has his action "*ob turpem causam*," to demand it back, if what was agreed upon be not fulfilled or complied with, examples of which are given in Ll. 47, 48, 49. 53, and 54. tit. 14. P. 5.<sup>20</sup> [Ll. 47, 48, 49. 53, and 54, tit. 14. P. 5.] But if this turpitude rests on him who gives or pays for the said object, he has no right to recover it back,<sup>21</sup> L. 50. tit. 14. P. 5. [L. 50. tit. 14. P. 5.]

§ 3. The second mode by which the debt is extinguished, is by discharge or release (*quitamiento*), when those duly author- [176] ised agree or consent never to demand from the debtor what was due by him, or when they discharge or release him from the debt, L. 1.<sup>22</sup> tit. 14. P. 5. [L. 1. tit. 14. P. 5.] Hence it is that the discharge

<sup>14</sup> Or false testimony. See L. 33. tit. 14. P. 5. cited.

<sup>15</sup> As a horse or a mule, instanced in L. 39. tit. 14. P. 5., cited.

<sup>16</sup> Provided both, as in the example put in L. 39. tit. 14. P. 5., should be alive; for if only one should remain, it seems, he forfeits the opportunity of relieving himself against the effect of his error.

<sup>17</sup> Erroneous in point of fact. See L. 40. tit. 14. P. 5., cited.

<sup>18</sup> For which L. 57., *ibid.*, is erroneously cited in the text.

<sup>19</sup> *Ob turpem causam*.

<sup>20</sup> Which see.

<sup>21</sup> *Palacios* observes, that this doctrine will be better understood by saying that, when the turpitude is only on the part of the receiver, the right or reclamation takes place; but when it is on the part of both giver and receiver, or on the part of the giver alone, it does not take place: only when there is no turpitude on the part of the giver does the right of reclamation exist.

<sup>22</sup> Not L. 11. *ibid.*, erroneously quoted in the original.

must be made by the creditor himself, or by his attorney having power to grant it, L. 7. tit. 14. P. 5. [L. 7. tit. 14. P. 5.]

§ 4. The third mode of discharging the debt is by novation (*renovamiento*), changing the cause of the debt or obligation, by paying in the way of loan that which was due in consideration, or for the value of a thing purchased; or by the debtor offering to the creditor another person to pay in his stead the debt<sup>23</sup> which he owes, L. 15. tit. 14. P. 5. [L. 15. tit. 14. P. 5.] In this case, 1st, It is necessary that the new or substituted debtor whom our laws term "*manero*," be expressly recognised or received by the creditor, renouncing the first debt,<sup>24</sup> because otherwise both of them remain bound, L. 15. tit. 14. P. 5. 2d, If this novation should be made conditionally, it has no force until the condition be fulfilled, L. 15. tit. 14. P. 5. 3d, This novation may be made by the new debtor obliging himself to pay or do purely or absolutely (*puramente*) that which was owing or performable conditionally, and expressly stating this circumstance,<sup>25</sup> L. 16. tit. 14. P. 5. [L. 16. tit. 14. P. 5.] 4th, As the novation of debts is a new obligation, the child under paternal power (*de familias*), shall not be able to contract it, except with respect to his property, called *castrense*, or *quasi castrense*, L. 17.<sup>26</sup> tit. 14. P. 5. [L. 17. tit. 14. P. 5.], nor the minor without the authority of his guardian,<sup>27</sup> L. 18. tit. 14. P. 5. 5th, He who becomes "*manero*," or undertakes to pay a debt for a person to whom he believed himself indebted, although he is obliged to pay the debt, will have his action to demand from him for whom he became bound, a release from the obligation, supposing he is not indebted to such person; and if the latter is not willing to consent to this, he shall be obliged to make satisfaction to the former for what he shall pay in his name, L. 19. tit. 14. P. 5. [L. 19. tit. 14. P. 5.]

<sup>23</sup> This is properly called delegation. See *Greg. Lop. Gl.* 15, tit. 14. P. 5., for which L. 15. tit. 4. P. 5., is misquoted in the original.

<sup>24</sup> Or rather releasing the first debtor from responsibility: this, although the literal version of the text, is not given in the exact words of the law cited, although clearly conveyed by it. See, however, *Greg. Lop. Gl.* 4. 6. and 7., L. 15. tit. 14. P. 5., cited.

<sup>25</sup> Or rather his consent to pay positively, although the condition on which the payment was originally due should not be fulfilled. See L. 16. tit. 14. P. 5., cited. *Palucius* also here observes, referring to the law just cited, that when the first obligation is conditional, and the second pure, there is no novation if the condition is not fulfilled; for it cannot be said that the second obligation renews the first, when the first does not yet exist, and it does not exist while the condition is not performed: notwithstanding, if it should be agreed that, although the condition of the first obligation might not be fulfilled, the second should be valid or binding, it would in effect be so, as is said in the law referred to; but it could not be said, properly speaking, that there was a novation in such case.

<sup>26</sup> This is a misquotation in the text: L. 17. tit. 14. P. 5. declares, a slave, except for a debt incurred by his owner by reason of the purchase for him of a *pejugar*, cannot novate; nor can a *femme coverte*, novation being in the nature of a security to which a married woman cannot bind herself. See the exception in L. 3. tit. 11. lib. 10. Nov. Rec.

<sup>27</sup> See L. 18. tit. 14. P. 5., cited; by which it appears, that a novation of a debt accepted from a minor, without the consent of the guardian, is not only not binding on the minor, but has the effect, also, of releasing the first debtor from the original obligation. See also *Greg. Lop. Gl.* 1. on this law.

§ 5. The fourth mode of discharging the debt is by tender of the debt or money due (*consignacion u oblacion*), when the debtor offers the payment at its time, and the creditor will not receive it; for then the former, by depositing it in the custody of the judge, or paying it into court, remains discharged from the obligation, and the good or ill that shall attend the thing is at the risk or injury of the creditor,<sup>28</sup> L. 8. tit. 14. P. 5. [L. 8. tit. 14. P. 5.].

§ 6. The fifth mode of discharging the debt is by compensation or set off, discounting one debt for another. In order to the validity of compensation, it is necessary, 1st, That the parties agree among themselves privately, or in court (*en juicio*). 2d, That the debts be [ 177 ] certain; for proof of which, when judicially pleaded (*en juicio*), a term of only ten days is given,<sup>29</sup> L. 20. tit. 14. P. 5. and L. 2. tit. 21. lib. 4. Rec. [L. 20. tit. 14. P. 5. and L. 1. tit. 28. lib. 11. Nov. Rec.] 3d, That the debts which are set off, be specified, certain, and *liquid*, L. 21. tit. 14. P. 5. 4th, This compensation ought to be judicially prayed for or demanded by the defendant, or party that was sued, and by no other,<sup>30</sup> except such give security that defendant will ratify and confirm, or hold valid what he shall do on his behalf, L. 25. tit. 14. P. 5.<sup>31</sup> [L. 25. tit. 14. P. 5.] 5th, Compensation does not take place in debts of the king, or of any corporation, L. 26. tit. 14. P. 5. [L. 26. tit. 14. P. 5.] 6th, Nor in the case of a deposit and of a debt which results from judicial sentence, L. 27. tit. 14. P. 5. [L. 27. tit. 14. P. 5.]

§ 7. The letter of license (*moratoria*) which the king may grant to debtors to prevent their being molested by their creditors, does not extinguish the debt, but only suspends it until the specified time.—*Vide Salgado Labyrinth. Crad. Part 2 Cap. 3.*

Cap. 3. As it often happens that debtors owe so much that their

<sup>28</sup> This will be equally the case, if the debtor should make an actual tender of the money to the creditor, at a proper time and place, before legal witnesses (*buenos omes*), and on the creditors refusing to receive it, should deposit it in the custody of a trust-worthy person, or in the vestry of any church. See L. 8. tit. 14. P. 5. cited.

<sup>29</sup> *Palacios* says, these ten days are for the defendant, who alleges the compensation to prove the debt due to him: for if he does not prove it in this period, the Judge will not allow the plea, and will proceed in the cognizance of the cause. It is said in the *Teatro de la Legis de Esp.* vol. 7. tit. compensation, p. 363. that the claim of set off may be alleged either before or after contestation of the plaintiff's demand, or in the act of the execution of the sentence. But if it is pleaded as an exception, it shall be pleaded and proved like all other exceptions, that is, on citation to *remate*. See L. 1. tit. 28. lib. 11. Nov. Rec. and L. 20. tit. 14. P. 5. cited in the text. See also Appendix Q. and R.

<sup>30</sup> "Not only," says *Palacios*, and as appears by L. 24. tit. 14. P. 5. to which he refers, "may the principal debtor pray or plead compensation, but so may his surety, in respect of the debt which is due by the plaintiff to himself or to the defendant, for whom he was surety."

<sup>31</sup> L. 25. tit. 14. P. 5. cited, particularly applies to the case of the son's pleading, on the behalf of his father, a set-off of a debt due by the plaintiff to the latter. See L. 24. tit. 14. P. 5. cited in the antecedent note.

<sup>32</sup> Given for an injury or offence committed against the injured party, by the person sentenced to pay it, as is observed by *Palacios*, and stated by L. 27. tit. 14. P. 5. cited in the text. The doctrine of compensation is said, in the *Teatro de la Legis de Esp.* vol. 7. cited in a. 29. ante, to have been adopted from the civil law without any alteration in practice. See *Wood's Inst. Civ. L.* book 3. ch. 9. p. 259. See also 3d *Blac. Com.* ch. 20. p. 304-5.



property is not sufficient to pay all their debts, the laws have provided the two proceedings of cession of property, and a meeting (*concurso*) of the creditors of a bankrupt,<sup>33</sup> by which the former secure what is due to them as far as the amount of his property is capable of satisfying them.

§ 1. The proceeding of cession is termed surrender (*desamparamiento*), by the laws of the Partida, tit. 15. P. 5. By it those whom ill fortune has reduced to the situation of being unable to pay their debts with the property they possess, cede it to their creditors in order that they may be paid out of it as far as it may be sufficient.

This cession may be made, 1st, By every person who shall be either his own master, or subject to the power of another, not having wherewithal to pay his debts,<sup>34</sup> L. 1. tit. 15. P. 5. [L. 1. tit. 15. P. 5.] 2d, The person who makes this cession ought to be a prisoner until the suit of his creditors be finished,<sup>35</sup> and shall be set at liberty on giving sufficient security<sup>36</sup> to pay at the periods stipulated, provided they do not extend beyond five years, L. 7. tit. 19. lib. 5. and L. 16. tit. 18. lib. 4. Rec.; [L. 7. tit. 32. lib. 11., L. 19. tit. 20. lib. 11. Nov. Rec.] without the creditors being able of their own authority to arrest their debtors, Ll. 5. and 6. tit. 13. lib. 4. Rec. [Ll. 5. and 6. tit. 34. lib.

<sup>33</sup> *Palacios* observe, that the text here proposes two different suits (*juicios*) *cesion de bienes*, and *concurso de acredores*, and under this division treats of both in their separate order; but that it ought to be observed, in order to avoid confusion and mistake, that what is said of one, appertains to the other, and that really they are one and the same thing, whether under the name of *cesion de bienes*, or under that of *concurso voluntario y preventivo*; the first being called *cesion de bienes*, because the debtor makes the cession; and the other *concurso*, because the creditors resort to it; that it is true there is a cession of property called *simple cession*, (for the differences between which, he refers to *Salgado Labyrinth. Cred.* p. 1. c. 1. § *init. et sequent.*) and that there are other sorts of *concursos*, as the necessary, which is called *pleyto u occurrencia de acredores* (suit, or meeting of creditors;) that called *espera* or *moratoria*, (time granted by creditors to debtors, for payment of their debts. See 7th vol. *Febr. ad P.* 2. lib. 3. ch. 3. § 3. p. 116. commencing n. 232.) and that called *remision o quitamiento de acredores*, (remission or abatement made by Creditors in their demands; in favor of their debtors; See 7th *Febrero adic.*, just quoted, p. 124. n. 245. to p. 125. ending n. 248.) but that the voluntary sort, or *cesion de bienes* is here treated of, which is called *concurso voluntario y preventivo*, and is that which is now in use. That cession of property, of voluntary and preventive *concurso* is, therefore, under this conception, a legal benefit or remedy which the Romans granted, L. 1. et 4. c. *qui bon. ced. poss.*, and was adopted in Spain for the benefit of debtors, who, by the misfortunes and calamities of the times, were unable to pay their creditors, being on this account imprisoned at the suit of some of them; and to prevent thereby such debtors being subjected to the vexations which their creditors caused them; and in order that they might recover their liberty on making a judicial cession of their property in favor of their creditors, and that the latter might be paid thereout, according to the preference of their demands; that this benefit hath been since extended to those who are not imprisoned. The Learned Professor concludes by referring for fuller information on the subject, to *Curia Philip.* § 24. P. 2. p. 165. *cesion de bienes*. *Covarrubias*, Lib. 2. var. res. ch. 1. L. 2 tom. p. 140. to *Salgado Labyrinth. Cred.* before cited, or to *Febr. refor.* lib. 3. c. 3. § 1. tom. 5. P. 2. p. 71.

<sup>34</sup> See 7 *Febr. ad P.* 2. c. 3. § 1. p. 2. n. 4. 5. 6. 7. and 22. p. 10. as to those who cannot make a cession.

<sup>35</sup> This is not at all necessary. See n. 33. ante; and so *Palacios* repeats in a note in this place.

<sup>36</sup> The giving security would seem to apply to the case of *espera*, and not to extend to *concurso* or cession. See L. 7. tit. 32. lib. 11. Nov. Rec. cited in the text.

11. Nov. Rec.] 3d, The cession ought to be made before the judge by the debtor himself or by his attorney, acknowledging his debts, and<sup>37</sup> after a sentence has been given against him, Ll. 1. and [ 178 ] 4. tit. 15. P. 5. 4th, The practice and judicial form or solemnity consist in the debtor presenting a petition, stating the reason of his imprisonment,<sup>38</sup> accompanied by two memorials or lists, one of his property and the other of his creditors, praying that the cession may be admitted, that an administrator of the property may be named or appointed, and himself set at liberty on his giving security<sup>39</sup> to pay, if he should arrive at better fortune, which cession is admitted no fraud being proved. But merchants who, six months before becoming bankrupts, took merchandise or money, on credit, are considered as fraudulent bankrupts (*alzados*), and incur the penalties set forth in Ll. 2. and 6. tit. 19. lib. 5. Rec., [Ll. 2. and 6. tit. 32. lib. 11., L. 7. tit. 32. lib. 11. Nov. Rec.] as provided by L. 7. *ibid.* 5th, The ceremony of putting the ring round the debtor's neck spoken of by Ll. 6. 7. and 8. tit. 16. lib. 5. Rec.<sup>40</sup> is not now in use. 6th, The cession is allowed on account or behalf of property which has been stolen (*por lo hurtado*),<sup>41</sup> on the corporal punishment being carried into execution, L. 9. tit. 16. lib. 5. Rec. [L. 8. tit. 22. lib. 11. Nov. Rec.] This cession is commonly formed when one or more persons are creditors<sup>42</sup> for debts of the same nature and class,<sup>43</sup> L. 2. tit. 15. P. 5.; [L. 2. tit. 15. P. 5.] and thus first, by this proceeding all are equally<sup>44</sup> paid according to the amount due to them, from the value or proceeds of the property sold at public auction under the authority of the judge, leaving nothing to the debtor but his wearing apparel, Ll. 1. and 2. tit. 15. P. 5. [Ll. 1. and 2. tit. 15. P. 5.]; unless this cession should be made by the father or the ascendants in favor of the descendants, or *vice versa*; or by the husband in favor of his wife, or by her in favor

<sup>37</sup> Read or see L. 1. tit. 15. P. 5. cited. In either case or mode may the cession be made, says *Palacios*. See *Greg. Lop.* Gl. 3. on the same law.

<sup>38</sup> If such should be the case. There are seven requisites to a properly formed cession or *concurso*; stated by *Febrero adic.* 7th vol. before quoted, p. 5. n. 10. *ad fin.* nos. 11. 12. 13. 14. 16. and 17. ending p. 8. *Salgado, Labyr. cred.* tom. 1. pars 1. c. 1. says there are six. See *ibid.* num. 7. 13. 21. 22. 27. and 41.

<sup>39</sup> It seems that this may be nominal security, or the *cautio juratoria* of the bankrupt, if he is not able to give any other. *Præstabit* (says *Covarubias*, 2d tom. lib. 2. cap. 1. *ver. res.* p. 143. num. 1.) *cedens cautionem de solvendo ære alieno cum ad pinguiores fortunas pervenerit: cautionem inquam juratoriam cum eo in statu aliam dare non valeat.*

<sup>40</sup> See nota 1. tit. 32. lib. 11. Nov. Rec., which says the laws cited in the text are obsolete.

<sup>41</sup> Theft (*hurto*). The punishment may be said to be two-fold by the Spanish law; first, as regards the relief to the party injured, or from whom the property is stolen, in its restitution, and sometimes beyond that, to him; and as regards the reparation to the public in the corporal punishment of the offender, according to the nature or quality of the offence, &c. See *THEFT*, Tit. XX. post.

<sup>42</sup> Three creditors, at least, are necessary, whose names must be set forth in the schedule or list to be given in by the debtor, at the time of making the cession. See *Febrero ad.* 7th vol. P. 2. lib. 3. § 1. p. 7. and *Salgado*, c. 1. n. 41. Par 1. p. 7.

<sup>43</sup> And likewise when of different classes. See L. 2. tit. 15. P. 5. cited.

<sup>44</sup> Not so. They are paid according to the preference to which their demands are respectively entitled. See § 2. post.

of him; or by the partner in favor of his copartner: or if this cession should be formed on account of a donation promised; for, in all these cases, the judge ought to leave a part of the property to the debtor for his support according to his situation in life (*estado*), L. 1. tit. 15. P. 5.; [L. 1. tit. 15. P. 5.] and as to what respects alimentary allowance to a debtor, see *Salgado, Labyrint. cred.* Part. 1. cap. 24.<sup>45</sup> 2d, In virtue of this cession the personal creditor may sue the debtor of his debtor, *Olea de cessione jur.* tit. 4. quæst. 4. n. 1., and the mortgagee who has a mortgage upon any note or bond (*vale*) of his debtor may sue the obligor of the note or bond on behalf of his debtor, [179] *Olea, ibid. á n. 23. al fin.* This cession does not comprehend or include the property of the wife which is not bound for the debts of her husband, L. 7. tit. 3. lib. 5. Rec., [L. 2. tit. 11. lib. 10. Nov. Rec.] nor can she be imprisoned (*ser presa*) for civil debt,<sup>46</sup> Ll. 10. and 8. tit. 3. lib. 5. Rec. [Ll. 2. and 4. tit. 11. lib. 10. Nov. Rec.]

§ 2. The meeting (*concurso*) of creditors is another proceeding (*otro juicio*) by which the debtor cites all his creditors in order to be paid according to the force and priority of the right of each. This proceeding is different<sup>47</sup> from the cession of property; 1st, Because in the *concurso*, as the only contention is with respect to the strength and preference of the sum due to the creditors, the amount that is due to each of them ought not to be expressed in the schedule or list of creditors. 2d, Because in the proceeding of *concurso* each creditor is cited individually or particularly. 3d, Bankrupts may form a *concurso*, but cannot make a cession,<sup>48</sup> *Salgado, Labyrint. credit.* Part. 1. cap. 1.

The competent judge in this proceeding, is he to whose jurisdiction the debtor is subject according to practice: for he is in this case the defendant, *Salgado, ibid.* Part. 1. cap. 2.; and even though the creditors be clergymen, or persons privileged (*extentos*), they ought to have recourse in this proceeding to the lay judge, *Salgado, ibid.* cap. 6.

The exchequer or crown (*fisco*) alone being a creditor, has the privilege of evoking the cause before its own judge; but this is avoided whenever a part of the property is separated or put apart for the payment of the crown's debt, *Salgado, ibid.* cap. 7. á n. 14. *al fin.*

The *concurso* of creditors is found established on these principles, 1st, That it is indivisible, as well with regard to the property of the debtor as to the rights of the creditors. 2d, That in it the creditors

<sup>45</sup> 1 tom. p. 194.

<sup>46</sup> See Appendix I.

<sup>47</sup> See note 33, 190. *ante.*

<sup>48</sup> *Palacios*, says, that these differences pointed out between *concurso* and cession, must be understood to apply to simple cession. The alleged difference in the text respecting bankrupts mentioned in the laws of the 32d title, 11th book, Nov. Rec. See also 7th vol. *Febrero ad.* before cited, p. 3. n. 6. and 7.; 1st vol. *Salgado, Lab. cred.* p. 7. n. 51. c. 1. Part. 1. There is no effectual difference between cession and *concurso*. They are both directed to the same object, the payment of the debts due by the insolvent, as far as the property ceded will go in satisfaction of them. See *Salgado, ibid.* n. 57. and 7th vol. *Febrero adic. ibid.* § 2. n. 40. *al fin.*

are to be graduated and paid according to the prelation of the sunis due to them. 3d, That this proceeding is an acquittance and discharge from the debts to that day contracted by the debtor.<sup>60</sup>

According to the first first principle, 1st, When the debtor forms a *concurso*, all the causes for debt pending against him ought to be accumulated to this proceeding, *Salgado, ibid.* Part. 1. cap. 4. n. 6., in which case he cannot revoke or supersede the proceeding according to practice and general opinion, unless it be by paying his creditors,<sup>61</sup> *Salgado, ibid.* Part. 3. cap. 16. 2d, If the *concurso* was formed by the creditors, although it be in a particular suit or proceeding, the causes ought to be accumulated, the judge before whom the suit was instituted having cognisance,<sup>62</sup> *Salgado, ibid.* Part. 1. cap. 4. § 1. 3d, The same takes place, although one of the creditors may have obtained a sentence in another tribunal; because [ 180 ] to preserve his right, he is obliged to have recourse to the *concurso*, *Salgado, ibid.* Part. 1. cap. 4. § 2. 4th, The creditor who does not make this application within the prescribed time,<sup>63</sup> loses his preference of rank (*grado*) and mortgage,<sup>64</sup> saving his right of recovering from what should remain, *Salgado, ibid.* Part. 1. cap. 8. 5th, Although the creditor retain the pledge (*prenda*) he must bring it into the *concurso* *Salgado, ibid.* Part. 1. cap. 11. P. 87. á n. 3. al 11. 6th, The creditor to whom tenant in tail (*poseedor de mayorazgo*) hath obli-

<sup>60</sup> Unleas, says L. 3. tit. 15. P. 5., he should have acquired such property (*ganancias*), as might enable him to pay all or a part of his debts, and to have sufficient left to live upon. So says the learned commentator on the laws of England, in a note y. p. 483. 2d. vol. book 2. ch. 31. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. The learned commentator on the *Partidas*, *Greg. Lop.* Gl. 3. on the law cited in the first part of this note, seems to think the debtor would not be so liable in respect of such after-acquired property in the case of compulsory cession, or *concurso de acredores: nota quod si cessio bonorum facta fuit cum vituperio, non tenebitur postea debitor etiam si pervenerit ad pinguorem fortunam*: and he adds, in Gl. 4. on same law, *Et sic in bonis quasitis post cessionem non tenetur ultra quam facere potest deducto, scilicet ne eget.*

<sup>61</sup> *Palacios* says, that by L. 2. tit. 15. P. 5., the debtor shall be able to revoke the proceedings without paying his creditors, before the cession is accepted and the creditors resort to the *concurso*. This he has adopted from *Febrero Reformado*, whom he cites: see 5th vol. page 84. n. 32. ch. 3. § 1.; and perhaps has collected it from *Greg. Lop.* Gl. 3. on this law cited; but the law itself only says, that the debtor may prevent the sale of the property ceded by him, alleging he wishes to get it back to pay his debts, or to make lawful defence against the claims of his creditors. See L. 2. tit. 15. P. 5. *al fin.* *Palacios* goes still further, and concludes his note referred to, by adding, that the debtor may even revoke the proceeding after it is contested, and without paying his creditors, if they refuse to suspend it (*remetrir*): but he is not supported by the quotation to which he refers in *Febrero Refor. ibid.*

<sup>62</sup> *Palacios* here observes, that when the *concurso* hath not been formed by the debtor, but by the creditors, it is called necessary *concurso*, or *meeting or proceeding of creditors*; and in this case, although it may agree in some things with the voluntary and preventive proceeding or cession, it is different in various others; and he refers to *Febrero Refor.* 5th vol. lib. 3. ch. 3. § 2. n. 86.

<sup>63</sup> Being specially and personally cited, it is presumed.

<sup>64</sup> This is not a settled opinion. See 1st *Salgado, Lab. Cred.* 1st. tom. ch. 8. Part. 1. before cited, n. 18. *et seq.*

gated or mortgaged all his property, which obligation was afterwards confirmed by the judge,<sup>54</sup> ought to be graduated or ranked (*graduarse*) in this proceeding, notwithstanding *Salgado, ibid.* Part. 1. cap. 31., says that the approbation only respected the property which the tenant was able to obligate.

From this it is also deduced, 7th, That the property which the debtor made over or assigned to his creditor, shall be brought into *concurso*, although it was assigned under an agreement that it should not come into *concurso*, *Salgado, ibid.* Part. 1. cap. 12.<sup>55</sup> 8th, That the heir of the debtor, during the *concurso*, although he should not have made an inventory, is not obliged to make satisfaction out of his patrimony, for the difference of property,<sup>56</sup> *Salgado, ibid.* Part. 2. cap. 1. *ú* n. 6. 9th, If the grandson, after the death of his father,<sup>57</sup> hath acquired the inheritance of his grandfather, the creditors of his father have no right or claim against this inheritance; *Salgado, ibid.* Part. 2 cap. 25. n. 17. and 18. 10th, When there are many demands against a debtor, but relating to different concerns (*negociaciones*),<sup>58</sup> and inheritances or properties (*patrimonios*); a separation of property is made, *e. g.* the creditors of the deceased do not class with those of the heir, particularly if he inherited with benefit of inventory: the same occurs when two entails are united in one person; or when there are creditors of a certain or particular administration, &c., *Salgado, ibid.* Part. 1. cap. 9. 11th, This accumulation of property and demands (*creditos*) is made equally in the *concurso* formed by the donee, or purchaser, when the debtor gives or conveys his property to them under an agreement to pay or satisfy his creditors, *Salgado, Part. 2. cap. 26. ú* n. 54. *al fin.* which is founded on the statement in L. 2, tit. 16. lib. 5. Rec. [L. 1. tit. 1. lib. 10. Nov. Rec.] that in virtue of an agreement, a right of action may be acquired against a stranger or third person.<sup>59</sup>

[ 181 ] Under the second principle, is comprehended the graduation or ranking of creditors. Of them we may form four classes. In the first, we place those who come with, or are entitled to dominion. In the second, those who have mortgages. In the third, personal chirographical (*quiografurios*) creditors.<sup>60</sup> And in the fourth place, creditors by verbal contracts.<sup>61</sup> To the first class belong, 1st, All those

<sup>54</sup> *Palacios* observes, properly, that *Salgado* says confirmed by the king; and that it ought to be so expressed: and he refers the reader to *Salgado* on this matter, in the cap. 31. Part. 1., cited.

<sup>55</sup> Num. 8. 22. and 23.

<sup>56</sup> This must mean if the heir hath not entered on the inheritance; because, otherwise, the reverse of what is laid down in the text, is stated by *Salgado*, in Part. 2. cap. 1., cited, n. 7.

<sup>57</sup> That is, his father having predeceased his grandfather.

<sup>58</sup> See *Cur. Phil.* tit. *Palacion*, p. 424. n. 60. *Febr. Adic.* 7 tom lib. 3. c. 3. § 2. p. 115. n. 230.

<sup>59</sup> See *Azevedo* on L. 2. tit. 16. lib. 5. Rec; n. 26. 27. 30. 31, &c.

<sup>60</sup> On simple written instruments, or notes of hand, &c. *Dr. Browne*, 1st. vol. *Civ. L.* p. 257. book 2. ch. 8. says, that *chirographa* may be compared with deeds poll.

<sup>61</sup> For full information respecting the different classes of creditors, and the preference

who deposit any thing except money, or other things which are wont to be delivered, measured, weighed, &c., because being of such a nature or description, the claimants are paid after the mortgage creditors; for it is not certain or clear, whether the articles exist or remain,<sup>62</sup> L. 9. tit. 3. P. 5. [L. 9. tit. 3. P. 5.] 2d, Those who deliver any thing on loan (*cosa prestada*),<sup>63</sup> according to L. 33. tit. 13. P. 5., in these words, "*Si el debdo primero es sobre peño,*" &c. 3d, The exchequer (*el Fisco*), when the property of the debtor has been confiscated, because the mortgage of the creditors is determined, and the *Fisco* acquires the Dominion, *Salgado, ibid.* Part. 4. cap. 9.

The creditor for expenses incurred on account of the funeral of the deceased debtor, although he has only a personal action, is so privileged, that he is preferred to every mortgage creditor, L. 30. tit. 13. P. 5.<sup>64</sup> [L. 30. tit. 13. P. 5.] *Rodriguez de concurs. cred.*, Part. 1. art. 3. num. 1. and 2. After him the costs of the suit and formation of the concurso, among which expenses are included those incurred by the administrator, shall be paid from the mass (*del cuerpo*) of the property; nevertheless, the administrator cannot retain the property, on account of any balance that may be due to him, but he must have recourse to the concurso, *Salgado, ibid.* Part. 3. cap. 9. n. 12.<sup>65</sup>

Among the mortgage creditors of the second class are privileged, 1st, *Dote*,<sup>66</sup> and the exchequer (*Fisco*) according to their respective anteriority, Ll. 29. and 33. tit. 13. P. 5. [Ll. 29. and 33. tit. 13. P. 5.] 2d, Those who give credit or lend money, to purchase, repair, preserve, and keep in order property mortgaged (*la hipoteca*), are pre-

of their demands, see *Curia Philip.* title *Prelacion*, lib. 2. com. Ter. c. 12. p. 414. *Febrero ad. 7 tom.* Part. 2. c. 3. § 2. p. 18. *et seq.*; or *Febr. Reform.* tom. 5. Part. 2. c. 3. § 2. p. 86. *et seq.*; and upon the whole matter of cession, *concurso*; and see the elaborate work of *Salgado, Labyrinthus Creditorum*, if this title should not damp the ardor of research, and deter from reference to this last work. The work of *Febrero*, however, treats, masterly, the whole subject.

<sup>62</sup> *Quere*, if the money, &c., can be identified, whether not entitled to preference. See *Febr. ad. 7 tom.* P. 2. lib. 3. c. 3. § 2. p. 101. n. 200, also 201. *Palacios*, referring to L. 2. tit. 3. P. 5., says that the reason for what is laid down in the text is, because the things there mentioned are of such a nature, that the dominion or property in them passes to the depositary; and that, consequently, the person who deposited them cannot claim thereby right of dominion, as he may those things which he deposited, and which do not consist in weight, measure, number. See note <sup>8</sup>, page 160. *ante*.

<sup>63</sup> *Palacios* says, that *prestar* properly speaking, is said of those things which are delivered by weight, number, or measure; and under this view, those who delivered any thing on loan (*prestada*), so far from being in a state to re-demand the dominion of it, have transferred it to the borrower (*mutuatario*), who received it, L. 1. tit. 1. P. 5. That what the text says, takes place when a book, horse, or other things not accustomed to be counted, weighed, or measured, are the subject of loan; in short, when delivered *en comodate*, that is to say; when the dominion or property hath not been transferred. He adds, that L. 33. tit. 13. P. 5. cited, in the text, does not treat of loans (*prestamos*), but of the privileges of the *fisc*, and *femme coverte*, for *dote*, with respect to her husband's property, &c. See this law.

<sup>64</sup> See also L. 9. tit. 3. P. 5.

<sup>65</sup> Wroglly cited. See *á n. 5. al 7. ibid.*

<sup>66</sup> L. 23. tit. 13. P. 5. adds, *ó de arras*; but *Greg. Lop.* Gl. 2., on this law, says, that this is understood of *arras* given in augmentation of *dote*, but not of simple *donatio propter nuptias*. See note <sup>35</sup>, p. 56. *ante*.

ferred to the anterior mortgagees, L. 9. tit. 3. P. 5. and Ll. 28,<sup>7</sup> 29, 30. tit. 13. P. 5. [L. 9. tit. 3. P. 5. and Ll. 28, 29, 30. tit. 13. P. 5.]

<sup>7</sup> The extraordinary extent to which the privilege arising from the doctrine contained in this law was carried under the sanction of judicial decisions in Trinidad, demands some notice, although the pretension to such privilege has been removed by a late Order in Council, of 5th August, 1822, given in the Appendix S.

So early as the month of October, 1809, in a case entitled "*Foulke versus Whitmore*," decided by his Honor, George Smith, Esq., now deceased, then Chief *Oidor* of Trinidad, and late Chief Justice of the Mauritius, as published in the Trinidad Gazette at the period in question, a claim was urged by the supplier of what were termed necessaries for the subsistence of the slaves, and the cultivation of a sugar estate, for preferential payment, over other creditors, out of the proceeds of the crop. The case was described by the learned judge, "as one deserving particular attention, and as arising out of those constant and unavoidable transactions which took place between planters and traders, by which the former were supplied by the latter with those articles either of subsistence for their negroes, materials for erecting or repairing buildings on their estates, or instruments of husbandry for the cultivation of their lands, all of which were stated by his Honor properly to come under the nomination of supplies for an estate."

It is not necessary, for the present purpose, to follow the terms of this decision further than to say, that the learned judge was pleased to found the reasons of his decision on a law of Spain, which, although it does not appear to bear directly on the question, he declared entitled the merchant to be paid for such supplies out of the crops of the ensuing year. The law of Spain referred to by the learned judge, was alleged to have been passed on the 16th July, 1790, and is presumed to be L. 5. tit. 8. lib. 10. of the Nov. Rec. of the laws of Castille.

In so far as regarded either the limitation or the description of articles denominated supplies by the learned judge, or of the privilege arising out of their advance or contribution, the decision in question was not, however, adhered to, in subsequent practice, with respect to demands of a similar nature: for attempts were, afterwards, made to procure the application of the provisions of the law cited in the text (L. 28. tit. 13. P. 5.), which was anterior to the one referred to by the Chief *Oidor*, and did not seem to have come under his view, to purposes and objects which it never contemplated.

A law (the 25th in one edition, and the 26th in another), of the 13th title, 5th *Partida*, first gave a tacit mortgage for moneys advanced to fit out or to repair a ship, or to repair or build any house or other building; and the 28th law of the same title and *Partida*, created the privilege in question. The compilation of the more modern laws of Spain, now called the *Novísima Recopilacion*, does not, it is apprehended, contain a solitary specific enactment on the point, or in the least analogous to the law of the *Partida* referred to in the text; and the laws of the Indies are, it is believed, equally silent on the subject: so that the law of the *Partida*, which was limited in its specifications, may be considered the only base on which a privilege was superstructed, until it reached a height or extent, that its destruction became, from the evils it produced, a matter of necessary justice, and of executive enactment.

The law of the *Partida*, thus supposed to have furnished the first foundation for a claim of this peculiar and extraordinary description, will be found to be borrowed from the Roman code; as a reference to Ll. 5. and 6. tit. 4. lib. 20. Dig. will show: but both the Spanish and Roman laws alluded to, specified the object of the application of the rule; and notwithstanding it is more usual to seek to limit than to extend privileges, the principle was extended, by the British judicial decisions in Trinidad, to objects which had no existence when these laws were enacted.

The laws of most countries of modern Europe will be found to have borrowed and acted up to the extent of the rule of the Roman law. Those of Great Britain, however, will be seen to have narrowed the rule, by restricting the lien or privilege to repairs on ships, and to have even confined the preference to repairs made in a foreign port; and to have fixed the *maximum* of amount to which such repairs may extend, by annexing disqualifications as to the character of the ship, in the event of an excess of repair beyond the amount so fixed. [See Mr. Abbott's (now Lord Chief Justice of England) most useful and able *Treatise on the Law relative to Merchant Ships and Seamen*, p. 133-142, 4th edit; also 26 G. 3. c. 60. § 2.]

The extent to which the privilege in question was carried in Trinidad, and its consequent evils, in the universality and indefinitude of the claims preferred under it, produced

After these are admitted the mortgage creditors,<sup>66</sup> without any distinction as to the nature of their mortgage, whether it be tacit or express, general or special, (although, with respect to this last, the authors do not agree) according to the anteriority and preference of their demands conformably with the rule which says, *qui prior est tem- [ 182 ] pore potior est jure*,<sup>67</sup> Ll. 27. and 29. tit. 13. Part. 5. *Rodriguez, ibid.* Part. 2. art. 1. *ú n.* 23. *al* 43. Wherefore if two creditors contracted with the debtor at one and the same time, although on different instruments, neither can pretend to anteriority, but they are both to be paid *pro rata*, *Salgado, ibid.* Part. 2. cap. 4. *ú num.* 132.<sup>70</sup> *al* 165.

From this principle it follows, 1st, That if any one mortgaged his property in favor of another as for a sum due (*por razon de credito*), and shall not receive the money, and he afterwards mortgages it to a second person who does deliver him the money, this second creditor shall be preferred to the first, L. 27. tit. 13. P. 5. 2d, That there being, for instance, three mortgage creditors, the third shall be preferred to the second, if the money which he lent was made use of to pay the debt of the first, or if the first should cede or assign to the third his right of preference,<sup>71</sup> the assignor of such right of preference, oc-

the Order in Council of his Royal Highness the Prince Regent, of 8th June, 1816, set forth in the Appendix M. The provision of this Order in Council was considered, however, nothing more than one of limitation or prescription with respect to the time for preferring claims of privilege allowed by L. 28. tit. 13. P. 5. to creditors, as they were termed, of *refaccion* and supply; and as made to prevent the frauds and prejudices which might arise to mortgagees and others, from the indefinite periods in which this privilege was claimed.

Finally, the Order in Council of the 5th August, 1822, Appendix S. declared that, from and after its publication, all privilege or preference in favor of any article of supply furnished subsequent thereto, with the humane exception in favor of slaves, in regard to articles furnished, under judicial sanction, for their subsistence, clothing, medical attendance, and payment of managers and overseers, pending an action or process brought against their owners and proprietors, should, as matter of right, cease and determine. It may be also observed, that a similar humane provision has been engrafted on the colonial codes of some of the British West Indian islands having local legislatures; and that, by them, debts contracted by a proprietor or possessor of a sugar, cotton, or coffee plantation, or of slaves, not less than twenty in number, generally employed as a task gang, for food and clothing furnished for necessary subsistence, are made a prior lien on all the slaves belonging to such plantation or task gang (except as against the king), if sued for within twelve months after actual sale and delivery of the articles specified, and other formalities pointed out by the law on the subject be complied with. See, on this point, the *Laws of Antigua*, published under the direction of *Anthony Browne, Esq.*, the agent of that island.

<sup>66</sup> *Palacios*, properly, observes, that before these come creditors for rent of land, who must be preferred to other creditors of whatever quality or class they may be, in regard to the fruits or product of the land for the amount of rent due; and he adds, that there are two cases mentioned in L. 30. tit. 13. P. 5., in which some mortgage creditors are preferred to those spoken of in the text.

<sup>67</sup> See the exception to the rule in L. 27. tit. 13. P. 5., in case of money agreed to be lent, being paid or delivered by the second mortgagee before that previously agreed to be advanced, and for which the first mortgage was executed, as stated *post* in the text.

<sup>70</sup> Read 154.

<sup>71</sup> This might lead to a first impression, that the doctrine of English equity, "that if a third mortgagee, who, at the time of his mortgage, had no notice of the second, purchases the first mortgage, both the first and third mortgages shall be paid out of the estate before any share of it can be appropriated to the second," was attributable to the Roman or civil law, notwithstanding my Lord Hardwicke, in his judgment in the case of *Wortley*



cupying the place of the third mortgagee, L. 34. tit. 13. P. 5. *Salgado, Lab. cred.* Part. 3.<sup>72</sup> § *un á* num. 59. *al* 73. 3d, Likewise, if any other person should pay the debt of the first mortgagee in the name of the mortgagor, he shall be preferred to all three, although he may

*versus* Bukhead, was pleased to state, "that this rule was founded on the particular constitution of the law of England; and that it could not happen in any other country but England, because the jurisdiction of law and equity was administered in England in different courts, and created different kinds of rights in estates," &c. See *Treatise on Equity*, 2d vol. book 3. ch. 3. p. 304., and Mr. Fonblanque's note (c) there. The above impression appears to have been entertained by *Dr. Browne*, in his *View of the Civil Law*, 1st vol. book 2. note (17.) p. 209.; although he seems to ascribe, erroneously, to Mr. Fonblanque, what is said by Lord Hardwicke, in his judgment in the case before mentioned: but further consideration will induce an admission of the exclusive title of England to the questionable credit (see Mr. Christian's note (4) 2d vol. *Blac. Com.* p. 160. cap. 10.) of the establishment of such a rule. By the Spanish law, the third mortgagee acquires no other right than what strictly belonged to the first, whose right and preference he may have purchased, and the intermediate mortgagees are not prejudiced by any act to which they were not parties, or did not consent. This also, it is conceived, will be found to be the extent to which the civil law has gone. (See *Wood's Inst. Civ. Law*, book 3. ch. 1. p. 223. subrogation or cession.) Law 34. tit. 13. P. 5., cited in the text, only says, that in such case, the third mortgagee shall have the right in the thing mortgaged which the first had; but it does not say that the third mortgagee shall be also paid the amount of a third mortgage to himself, in preference to the mortgage previously given to the second mortgagee: and the latter part of the law gives, expressly, to the second mortgagee, the right to stand in the place of the first mortgagee, even after the assignment to the third of the first mortgagee's right, on the repayment only by the second mortgagee to the third mortgagee, of the sum paid by the latter to the first mortgagee, not exceeding the amount that was due on the first mortgage. This explanation of the Spanish rule of law is founded upon the Law (34. tit. 13. P. 5.) cited in the text, and is fully supported by *Salgado, Lab. Cred.* Part. 3. cap. 13.; see particularly num. 33. 35. 36. 59. 60. 75. 79. 80. 81. 99. 103. 104. *ibid.* It may be permitted to observe in this place, that the doctrine of tacking, as known to British courts of equity, has not, however, the same claim to originality as the rule of English equity before mentioned, but unequivocally proclaims its Roman parentage under the title of *retentio*, and has also been transplanted into Spanish jurisprudence. Law 22. tit. 13. P. 5., expressly recognizes this doctrine, and says that, if a man is indebted, on mortgage, to another, and should afterwards borrow more money from, or contract to the mortgagee another debt, personal, or not secured by mortgage, the mortgagor shall not redeem without payment of the latter debt, as well as that secured by mortgage; and adds, that this only holds as regards the mortgagor and his heirs, and will not affect a subsequent mortgagee or *bonâ fide* purchaser; in which case, such subsequent mortgagee or purchaser may redeem upon payment of the mortgage debt only. See L. 22. tit. 13. P. 5., cited; also *Treatise on Equity*, Mr. Fonblanque's note in 2d vol. book 3. ch. 1. § 9. p. 272.; also *Powell on Mortgages*, 1st vol. p. 315. The laws of the 16th title, 10th book, *Nov. Rec.*, required the registry of all mortgages, in the mode and at the times thereby pointed out; and, as regards Trinidad, the proclamation of 5th February, 1814, and the Order in Council of 6th April, 1818, have since made ample and particular provisions respecting the execution, registry, &c., of all mortgages, contracts, deeds, &c., affecting real property and slaves in that island; both of which see in Appendix O. P.

By L. 10. tit. 13. P. 5., a mortgagor cannot grant a second mortgage without the knowledge and consent (*sin sabiduria y sin mandado*), of the first mortgagee, unless the mortgaged property should be worth the amount of both debts; otherwise, besides being obliged to give another or available mortgage to the second creditor, the mortgagor is guilty of fraud, or *stellionate*, and is liable to be punished at the discretion of the judge. In respect to England, by the 4th and 5th *W. & M.*, if any person mortgages his estate, and does not previously inform the mortgagee, in writing, of a prior mortgage, or of any judgment or incumbrance which he has voluntarily brought upon the estate; the mortgagee shall hold the estate as an absolute purchaser, free from the equity of redemption of the mortgagor. See Mr. Christian's note (2), *Blac. Com.* p. 159. ch. 10., and the Act cited.

<sup>72</sup> Add. cap. 13.

not be a mortgage creditor, provided that the first creditor whom he pays code to him his right, *Olea, de ces. jur.* tit. 5. quæst. 1. á num. 15. *al* 18. 4th, That the mortgage creditor, with an instrument made by a public escribano,<sup>73</sup> (*de guarantiguia ó de tercio*) is preferred to a creditor who has none; unless the second has a private instrument, written and signed with the hand of the debtor, and witnessed by three witnesses,<sup>74</sup> L. 13. tit. 13. P. 5. [L. 13. tit. 13. P. 5.] *Salgado, ibid.* Part. 2. cap. 21. n. 29. 5th, That if the first creditor consented to the mortgaged property being mortgaged in favor of a third person, the mortgage of the first is determined in favor of the latter, who is considered anterior with respect to the first; but he does not obtain any greater right to the prejudice of the intermediate creditors between him and the first mortgagee, *Salgado, ibid.* Part. 3. cap. 13. § *un á* num. 19. *al* 44. 6th, That if a creditor is mortgagee of entailed property, and of that which is not entailed, he ought to be paid in the first place out of the latter, because the obligation of the former is subsidiary, *Salgado, Part. 2. cap. 5. num. 16. and 17.* 7th, That if the possessor of an entail hath redeemed an annuity, he enters into the place of the annuity creditor, *Salgado, ibid.* Part. 2. cap. 7. 8th, The first conditional creditor, having fulfilled [183] the condition, is preferred to him who hath not fulfilled it, L. 32. tit. 13. P. 5. [L. 32. tit. 13. P. 5.] 9th, That the mortgage executed by virtue of a power (*mandato*), does not refer back to the date of the power, as to the effect of being preferred to other mortgages executed before the date of the mortgage executed in virtue of such power, because the power of itself produces nothing, *Salgado, ibid.* Part. 1. cap. 30.<sup>75</sup>

The chirographical creditors (*chirografarios*) of the third class ought to be paid their demands *pro rata*, from the remnant of the property; L. 11. tit. 14. P. 5. [L. 11. tit. 14. P. 5.]; *Rodriguez, ibid.* Part. 2. art. 3. num. 2. And it is to be observed, that L. 48. tit. 25. lib. 4. Rec. [L. 5. tit. 24. lib. 10. Nov. Rec.] considers as privileged the creditor who has a bond on stamped paper, in respect of him who has not.

To the third principle appertains, 1st, That the debtor, forming a *concurso*, is not obliged to pay the debts which, by reason of his insufficiency of property, remain unsatisfied, although he may afterwards attain to better fortune;<sup>76</sup> in which respect, this proceeding

<sup>73</sup> See L. 10. tit. 13. P. 5.

<sup>74</sup> See Appendix O. and P.

<sup>75</sup> See note <sup>60</sup>, p. 176. *ante*.

<sup>76</sup> The debtor, says *Palacios*, although he forms a *concurso*, is not thereby discharged from the payment of those debts which, for want of property or means, remain unsatisfied. For, by the *concurso*, neither the natural nor civil obligation he is under to pay them is extinguished. Therefore, if the debtor should arrive at better fortune after the *concurso*, he shall be obliged to pay, out of his newly-acquired property, his creditors who are unsatisfied. The only thing which L. 3. tit. 15. P. 5, allows him, in this case, is the benefit of competency, which means alimént from his property so acquired, and even to this it offers an exception in two cases; that is to say, when he should have any office or employment by which to earn a livelihood, L. 15. tit. 10. P. 5. *al fin*; and when the

(*juicio*), differs from the cession of property. 2d, That the property being already adjudged, sold (*rematados*), and the term expired, if a better bidder offers, he ought to be accepted, which is special in the proceeding of *concurso*, for the interest of the creditors and of the debtor, *Salgado, ibid.* Part 2. cap. 2.<sup>77</sup> 3d, That, as the property of the *concurso* is destined for the payment of the creditors, and the debtor cannot administer it, he is incapacitated from making any contract with respect to it, *Salgado, ibid.* Part. 1. cap. 14. n. 4. *al* 21. 4th, That, by this proceeding, the power is extinguished, which the debtor gave to another person to administer, pay, &c., *Salgado, ibid.* Part. 1. cap. 28. 5th, That, if the debtor, during this proceeding,<sup>78</sup> should alien his property, or part of it, in fraud of his creditors, they may annul the alienation or transfer, within a year after they knew of it, except it was made in favor of a minor (*huerfano*), who ought to be reimbursed for the price or value, Ll. 7 and 15.<sup>79</sup> tit. 15. P. 5. [Ll. 7 and 15. tit. 15. P. 5.] 6th, But notwithstanding this, the debtor may renounce an inheritance or legacy, &c., because it is one thing to aliene, and another not to acquire, *Salgado, ibid.* Part. 2. cap. 24. num. 4. 5. 6. and 17. 7th, That if the property of the debtor should [ 184 ] not be sufficient to pay his debts, the sales which shall have been in contradiction (*á oposicion*) of his creditors or their attorneys,<sup>80</sup> within the year, may be set aside or annulled, L. 8. tit. 15. P. 5. [L. 8. tit. 15. P. 5.] 8th, That the debtor may pay whichever of his creditors he pleases, even in case of not having sufficient property, provided it be before he makes a cession of his property, or before a *concurso* of his creditors takes place; and if otherwise, they have a right to demand the return of what shall have been received by the person whom the debtor hath paid,<sup>81</sup> L. 9. tit. 15. P. 5. [L. 9. tit. 15. P. 5.] 9th, That if creditors of a lower degree were paid in preference to those of a higher degree, the latter may demand or proceed against any of the former they may please, for the revocation of the payment, and recover the sum which such posterior creditors have received against the due order of payment, *Salgado, Part. 3.*

creditor or creditors unsatisfied, should be so poor as not to have wherewithal to support themselves; and the Learned Professor refers to *Febrero (reformado)* Lib. 3. cap. 2. § 3. n. 154. (not 161. as cited.) See also n. 153. and 155. *ibid.* and Lib. 3. cap. 3. § 1. n. 19. It is to be observed, that L. 15. tit. 10. p. 5. relates to a bankruptcy or distress occasioned by the demands of one copartner against another, and that the Learned Professor has incorporated an observation of *Greg. Lop. Gl.* 8. L. 15. tit. 10. P. 5. on the law itself, which will not be there found, as to the debtor having an office or employment, or he has taken it from *Febrero (reformado)*, whom he cites. Both the laws cited in this note forbid the stripping the bankrupt of all his subsequently acquired property for the satisfaction of old unsatisfied claims, and require sufficient to be left him thereout for his support.

<sup>77</sup> Numb. 12. *et seq.*

<sup>78</sup> L. 7. tit. 15. P. 5. cited, says, after the debtor *es condenado en juicio*.

<sup>79</sup> There is no such law in tit. 15. P. 5.

<sup>80</sup> *Licet non constet aliter de participatione fraudis*, says *Greg. Lop. Gl.* 1. L. 8. tit. 15. P. 5. cited.

<sup>81</sup> This, observes *Palacios*, takes place in respect of creditors of equal right; for if it should not be so understood, this doctrine would be contrary to that laid down in the 8th, or following number of this section. See *Greg. Lop. Gl.* 3. L. 9. tit. 15. P. 5. cited.

cap. 14. 4 n. 19. *al* 29. 10th, That releases or discharges by the debtor of debts due to him, in prejudice of his creditors, are not valid;<sup>22</sup> L. 12. tit. 15. P. 5. [L. 12. tit. 15. P. 5.] 11th, That if, during the proceeding of concurso, the inability of the debtor to pay, appears manifestly, the creditors may have recourse to his sureties, *Salgado, ibid.* Part. 1. cap. 23.

<sup>22</sup> When, observes *Palacios*, (as does also L. 12. tit. 15. P. 5. cited,) this is done fraudulently, and the debtors, in favor of whom the discharge is granted, are cognisant of the fraud, and the consideration or cause of their debt is *onerous*; for if it were lucrative, their knowledge of the fraud would not be necessary to render the release invalid, and he refers to L. 7. tit. 15. P. 5, and to *Greg. Lop.* Gl. (2. 3. 4. 5.) on Law 12. *ibid.*

## TITLE XII.

OF COMMISSION, AUTHORITY, OR POWER OF ATTORNEY  
(MANDAMIENTO).

CAP. 1. A COMMISSION (*mandamiento*) is a contract of [ 186 ] good faith, by which one person commits to the gratuitous charge of another his affairs, and the latter accepts the charge. It may be advantageous to the constituent alone, to a third person, or to the principal jointly with a third person,<sup>1</sup> Ll. 20. and 21. tit. 12. P. 5. [Ll. 25. and 21. tit. 12. P. 5.] in as much as the two kinds mentioned in L. 22. tit. 12. P. 5. [L. 22. tit. 12. P. 5.] are more in the nature of a debt with interest (*al credito con interes*), and that in L. 23. *Ibid.* [L. 23. tit. 12. P. 5.] is reduced to simple advice or counsel. From this we derive two principles: 1st, That this contract is perfected by mutual consent. 2d, That in it the faith or friendship of the party is particularly considered.

From the first principle, it is inferred, 1st, That the commission may be amongst absent persons by letters (*cartas*), and messengers (*mensugeros*), limited, or for a certain time, under condition,<sup>2</sup> &c., L. 24. tit. 12. P. 5. [L. 24. tit. 12. P. 5.] 2d, That the ratification has the force or effect of a commission (*mandato*); e. g. if one without the order of another shall recover and pay his debts, and the latter shall subsequently approve of it, L. 32. tit. 12. P. 5. [L. 32. tit. 12. P. 5.] 3d, That the *mandamiento* is at an end, by the dissent of the parties, by renunciation,<sup>3</sup> and by the death of the mandator or of the mandatee.

<sup>1</sup> Or, says *Palacios*, to the *mandator* and the *mandatee*, or to the *mandatee* and a third person, or to the *mandatee* alone. There are the kinds which are pointed out by Ll. 22. and 23. tit. 12. P. 5., which properly belong to this title, although that mentioned in L. 23. is, as the authors say, more advice or counsel, than commission; on account of which the adviser is not bound or liable for any thing, unless the advice should have been given with an evil design (*con mala intencion*), and any injury should result to the person advised; for in this case the adviser would be obliged to pay. See *Wood's Inst. C. L.* book 3. ch. 5. p. 242. and 243.

<sup>2</sup> Or *general, special, or absolute*. See L. 24. tit. 12. P. 5. cited.

<sup>3</sup> *Palacios* says, there is no royal law or statute which declares that the commission is put an end to or dissolved, by the renunciation of the *mandatee*, and if attention is paid to the words of L. 20. tit. 12. P. 5.; for if the *mandatee* receives or undertakes the commission, who is obliged to fulfil it, we should say, that the *mandatee* cannot renounce it; and more so, if to this is added L. 1. tit. 1. lib. 10. Nov. Rec. [L. 2. tit. 16. lib. 5. Rec.] Perhaps the Learned Professor's objection may be obviated by saying, timely renunciation. L. 20. tit. 12. P. 5. adds, that if he who receives, *id est*, undertakes a commission, is guilty of any fraud in not fulfilling the commission, or if by his fault (*culpa*), any damage results to the *mandator*, the *mandatee* is liable for it. And *Greg. Lop. Gl. 5.*, same law, says, that this liability is for the smallest (*levissima*) fault or neglect. It is to be recollected, that the commission must be undertaken *gratis*. The notions of friendship are, perhaps,

From the second principle it is deduced, 1st, That the mandatee ought not to exceed the limits of his authority which are expressed in the power. 2d, That the mandatee has his action to recover the expenses which he has incurred on account of the mandator, L. 25. tit. 12. P. 5. [L. 25. tit. 12. P. 5.]

Cap. 2. Here belongs also the voluntary attorney, or *negotiorum gestor* of the Romans; that is, one who takes charge of other persons' business without the knowledge of the owner.

Hence arises this axiom: That the owner or principal remains obliged by a consent presumed from the advantage which he derives.

From this we infer, 1st, That if any one, without an authority or commission (*mandato*), administers, improves, and benefits the property of an absent person, he may recover the expenses from the owner, to whom he shall be obliged to give a just or perfect account of all that has been done by him, Ll. 26. and 31. tit. 12. P. 5. [Ll. 26. and 31. tit. 12. P. 5.] 2d, The same is understood of the expenses incurred on the property of a minor (*huerfano*), except with [187] respect to those which are not permanent, which the minor is not obliged to pay,<sup>4</sup> L. 28. tit. 12. P. 5. [L. 28. tit. 12. P. 5.] 3d, That although a person with a bad intention laid out expenses on the property of another, from which it derived benefit, he may retain for them; but not for those from which utility resulted to the property,<sup>5</sup> L. 29. tit. 12. P. 5. [L. 29. tit. 12. P. 5.] 4th, That the administrator of another's property, is obliged to pay the injury (*los perjuicios*) occasioned by his fault or fraud, unless it be, that finding the property entirely abandoned, he was desirous of administering it out of pure compassion,<sup>6</sup> L. 30. tit. 12. P. 5. [L. 30. tit. 12. P. 5.] 5th, That whoever intermeddles in the administration of the affairs of another without a commission (*mandato*), only ought to do that which the principal was accustomed to do; and, acting otherwise, he shall be responsible for the damages which he might occasion,<sup>7</sup> L. 33. tit. 12. P. 5. [L. 33. tit. 12. P. 5.] 6th, That if any one, out of charity, un-

not carried in modern times to that exalted or refined pitch they were wont to be among the Romans, and the considerations suggested by this note may induce great caution in respect of undertaking such an office or duty.

<sup>4</sup> L. 23. tit. 12. P. 5. says, that if the expenses laid out on the property of a minor of 14 years should be necessary, the voluntary attorney who incurred them ought to recover them from the minor; but that if such expenses or outlays should appear useful at first, and it should afterwards turn out they were not so, the tutor under whose tutelage the minor should be, is bound to pay them. In the instance hitherto put in the text, *buena fe* is considered to have actuated the *negotiorum gestor*.

<sup>5</sup> Not those it should be, observes *Palacios*, from which utility did not result to the property.

<sup>6</sup> *Palacios* observes, that L. 30. tit. 12. P. 5. cited, does not make this exception; but what it says is, that if prejudice or injury to the proprietor should be occasioned by fraud, the administrator, in every such case, is bound to make it good, even though he be a person who administered from pure compassion; and that *Greg. Lop.* Gl. 3. on the same law, adds, this last person is also obliged to make good that occasioned by his gross fault, (*culpa lata*); which also accompanies or is compared with fraud.

<sup>7</sup> Whether occasioned by his fault, or by casual or unforeseen events, or in any way whatsoever. See L. 33. tit. 12. P. 5. cited.

dertakes the education and bringing up of any minor (*huerfano*), he cannot demand or recover the expenses which he shall have incurred by reason thereof, L. 35. tit. 12. P. 5. [L. 35. tit. 13. P. 5.;] excepting, if the mother, grandmother or stepfather, having under their power or care their children or grandchildren, &c., furnished them aliment, and educated or brought them up, protesting or declaring that they did it with the intention of being reimbursed from the minor's property,<sup>a</sup> Ll. 36. and 37. tit. 12. P. 5. [Ll. 36. and 37. tit. 12. P. 5.]

Cap. 3. By *Auto acordato* of 5th May, 1766, cap. 7., [L. 1. tit. 18. lib. 7. Nov. Rec.,] it was ordered that every town (*comun*), or corporation (*concejo*), should elect every year a public procurator or attorney syndic (*procurador sindico personero del publico*), which ought to be done by the town (*pueblo*), being divided into districts or wards (*barríos*), as the instruction of 26th June of the same year, 1766, more fully provides; and inasmuch as in many towns the office of procurator syndic is sold (*enagenado*), or devolves by custom or by privilege upon a particular regidor of the cabildo, or the latter is accustomed to elect or propose him, it was ordered that in such towns the public should choose annually a procurator, *Cedulas de* 15th November, 1767. L. 3. tit. 18. lib. 7. Nov. Rec. These attorneys have their seat in the cabildo after the syndic, and the meetings with respect to the public granaries (*de posito*), with a right to ask and propose every thing which may appear conducive to the public benefit, but without a right of voting in the like way as the syndics, who have never enjoyed it, as may be seen more at large in the cedulas referred to.

<sup>a</sup> L. 37. tit. 12. P. 5., as regards stepfathers, says, that notwithstanding this declaration if the youth should be of an age to be serviceable to his stepfather, his services shall be an equivalent or compensation for the expense of maintaining him, but not for extraordinary expenses, or those incurred in the care, &c., of the youth's property; and that what is said in this law as to step-parents having charge, &c., of their step-children, is understood to apply to all persons having charge of other people's children.

## TITLE XIII.

## OF PURCHASE AND SALE, OR BUYING AND SELLING (COMPRA Y VENTA).

CAP. 1. OF the contracts which are onerous to both [ 188 ] parties, the first is that of sale and purchase, or selling and buying. This contract is a sort of agreement which men make use of among themselves, and is made with the consent of both parties for a certain price which the purchaser and seller agree upon, L. 1. tit. 5. P. 5. [L. 1. tit. 5. P. 5.]

§ 1. From this definition it follows, 1st, That purchase and sale is perfect or complete by the consent of both parties. 2d, That every thing in commerce, or that is not prohibited, may be sold and purchased. 3d, That the price ought to be certain, just, and for money counted (*en dinero contado*.) 4th, That this contract is onerous to both parties.

From the first axiom it is deduced, 1st, That all those may sell and purchase, who may consent freely,<sup>1</sup> L. 2. tit. 5. P. 5., [L. 2. tit. 5. P. 5.] whether by parol, by letter (*carta*), by messenger (*messenger*), or by deed, L. 8. and 48. tit. 5. P. 5. [L. 8. and 48. tit. 5. P. 5.] 2d, That children under the paternal power cannot purchase, nor can merchants sell to them,<sup>2</sup> L. 22. tit. 11. lib. 5. Rec., [L. 17. tit. 1. lib. 10. Nov. Rec.;] neither can students, L. 4. tit. 7. lib. 1. Rec. [L. 1. tit. 6. lib. 2. Nov. Rec.] 3d, that the son can only sell to his father his property called *castrense ó quasi*, L. 2. tit. 5. P. 5. [L. 2. tit. 5. P. 5.] 4th, That no person can be compelled to sell his property by force, unless public utility requires it, L. 3. tit. 5. P. 5., Gomez, lib. 2. var. res. cap. 2.<sup>3</sup> 5th, That for want of this free consent, guardians and executors cannot purchase any of the property which they administer, L. 23. tit. 11. lib. 5. Rec., [L. 1. tit. 12. lib. 10. Nov. Rec.,] unless a decree should be previously given by the judge, stating its advantage to the minor,<sup>4</sup> L. 4. tit. 5. P. 5. [L. 4. tit. 5. P. 5.] 6th, That the sales made by the judges, compel- [ 189 ]

<sup>1</sup> Who may bind themselves, and mutually contract with one another. See L. 2 tit. 5. P. 5.

<sup>2</sup> Under the paternal power without consent of fathers; nor minors, without consent of guardian. See the law cited.

<sup>3</sup> Numb. 51.

<sup>4</sup> *Palacios*, in a note on a former part of the text, Lib. 1. tit. 3. § 2., observes, that when L. 23. tit. 11. lib. 5. Rec. (L. 1. tit. 12. lib. 10. Nov. Rec.) prohibits the guardian from purchasing any thing belonging to the ward, it does not add that he may do it with the authority of the judge, and the consent of the co-guardians, and that the interpreters dispute, whether by this law of the Rec. L. 4. tit. 5. P. 5. was repealed or altered, which, with the observance of these requisites, permitted the purchase. See *Greg. Lop.* Gl. 8, L. 4. tit. 5. P. 5., and *Asensio* on L. 23, tit. 11. lib. 5. Rec. n. 3. 4. 5. 6.



ling any person to purchase the property of delinquents, are null, L. 18. tit. 1. lib. 8. Rec. [L. 7. tit. 12. lib. 10. Nov. Rec.] 7th, That the sale made against one's will or consent, and through fraud or deceit on the part of the purchaser, is not valid,<sup>5</sup> L. 57. tit. 5. P. 5. [L. 57. tit. 5. P. 5.] 8th, That the sale<sup>6</sup> made with another person's money is valid, except it be of persons privileged mentioned by L. 49. tit. 5. P. 5. [L. 49. tit. 5. P. 5.]

From the same it follows, 9th, That if the parties should disagree about the price or as to the thing sold, the sale is not valid; or if there should be a fraudulent error or mistake as to the material of which the thing is composed, as selling brass for gold,<sup>7</sup> &c. Ll. 20. and 21. tit. 5. P. 5. [Ll. 20. and 21. tit. 5. P. 5.] 10th, That this contract is perfect or complete as soon as the purchaser and seller are agreed upon the price of the thing, although no earnest money may have been paid nor given,<sup>8</sup> L. 6. tit. 5. P. 5., and L. 2. tit. 16. lib. 5. Rec., [L. 6. tit. 5. P. 5. and L. 1. tit. 1. lib. 10. Nov. Rec.] in virtue of which last law, every obligation derives its force from mutual consent.

From the second action it is inferred, 1st, That there is no difference with respect to purchase and sale, whether the thing which is the object of it exists now, or may exist hereafter<sup>9</sup> as the fruits of an estate; and if these shall not grow, the price shall be restored to the purchaser, unless they were purchased at a hazard (*á la ventura*); *ex. gr.* the first fish that is caught or killed, L. 11. tit. 5. P. 5. [L. 11. tit. 5. p. 5.] But if these *fruits* should be sold with the knowledge of the vendor that the thing sold would not produce them, although

<sup>5</sup> Sale made through fear, force, or fraud. See Ll. 56. and 57. tit. 5. P. 5. *Palacios* says, if the sale is against will or consent, although without fraud or deceit, it is void; if with fraud or deceit alone, it is either void immediately, or may be prayed to be declared void, or the price be either reduced to what is the just value, or the sale annulled. If fraud or deceit was the cause of the contract, and inducement to it, the contract is void. It may be prayed to be annulled or made void, if there should be any fault or defect in the thing sold, and the seller should not have manifested or pointed it out; in which case, the purchaser may return the thing, and demand back the sum paid for it (*redhibitoria*.) L. 65, tit. 5. P. 5., and it may be prayed, that the price be reduced to the just value, when there should have been deceit or lesion in more than half the just value; in which last case, the person deceived may pray, either that the sale be annulled, or be reduced to the just value (*quanto minoris*), which shall be optional with the person guilty of the deceit, L. 56. tit. 5. P. 5. See the same stated in *Wood's Inst. Civ. Law*, book 3, chap. 5. p. 230.

<sup>6</sup> Road purchase; and in such case, the property purchased belongs to the person by and in whose name bought, and not to the owner of the money, except the money belonged to knights in the court of the king, minors, or *femme covertes*, as *dote* and others, mentioned in L. 49. tit. 5. P. 5., cited.

<sup>7</sup> *Palacios* says, if the error should be in the substance or body of the thing sold, whether it be fraudulently made or not, the sale is void, as may be seen by Ll. 20. and 21. tit. 5. P. 5., cited.

<sup>8</sup> See Proclamation, Trinidad, 5th February, 1814, and Order in Council, 6th April, 1818, Appendix O. P. See also the distinction made by L. 6. tit. 5. P. 5., as to when it is contracted that the sale shall be by deed (*carta*), in which case, the party may repeat before the execution of the deed.

<sup>9</sup> The text says "*que exiate, or ha de exiatir*;" and see *Greg. Lop.* Gl. 1. and 2. on L. 11. tit. 5. P. 5., cited.

the contract is valid, he is bound to reimburse the purchaser for the damages and prejudices which may have resulted to the latter from not having the *fruits*,<sup>10</sup> L. 12. tit. 5. P. 5. [L. 12. tit. 5. P. 5.] 2d, That things incorporeal may be the object of this contract: *ex. gr.* rights, actions, &c., L. 13. tit. 5. P. 5. [L. 13. tit. 5. P. 5.] 3d, That the property of another person may be sold, the vendor entering into a warranty<sup>11</sup> (*saliendo á la evicción*), if the owner should recover it at law; of which we shall speak hereafter, L. 19. tit. 5. P. 5. But if the king should sell another person's property as his own, the owner shall recover its value within four years,<sup>12</sup> L. 53. tit. 5. P. 5. [L. 53. tit. 5. P. 5.] *Castillo*, L. 3. *Controvers*, cap. 6. 4th, That a person may sell the thing which he has conjointly with another, provided he pays the amount of his partner's share, unless a proceeding or suit for a division hath been previously instituted,<sup>13</sup> L. 53. tit. 5. P. 5. [L. 53. tit. 5. P. 5.] 5th, That the sale of that which is [ 190 ] destroyed, pulled down, or burnt in whole, or the greater part,<sup>14</sup> is not valid; but if it be only in the smaller part, the contract will be valid, making a reduction in the price for what it shall be worth less on account of this deterioration, except the thing should have been sold under these circumstances, with the knowledge of the seller; for then, although the contract does not subsist, he is obliged to pay the damages and prejudices to the purchaser, L. 14. tit. 5. P. 5.<sup>15</sup> [L. 14. tit. 5. P. 5.]

§ 2. From the same axiom it results that the following cannot be sold: 1st, Sacred things, unless they are sold as accessory to some territory or seigniory,<sup>16</sup> L. 15. tit. 5. P. 5. [L. 15. tit. 5. P. 5.] or under

<sup>10</sup> Or the value of the *fruits*.

<sup>11</sup> The sale by a person of another's property is valid, says *Palacios*, whether the vendor enters into or agrees to the warranty (*evicción*) or not; for the nature of this contract carries with it the circumstances of warranty, whether it be expressed or not: what is to be understood here is, that if the purchaser knew that the property belonged to somebody else when he bought it, and if he is afterwards condemned to restore it to the owner, the vendor would not be bound to return him the price, unless he should have been bound to the warranty; but if the purchaser was ignorant that it was another's property, the vendor would be obliged to return to the purchaser the price paid, together with the damages which may have resulted to him by this sale. See L. 19. tit. 5. P. 5., cited; also *Wood's Inst. C. L.*, book 3. c. 5. p. 233.

<sup>12</sup> That is, says *Palacios*, the dominion is immediately transferred to the purchaser, and the owner remains only with the power or right of demanding its value from the king within four years. L. 53. tit. 15. P. 5., cited.

<sup>13</sup> *Palacios* says, that in the case proposed, the partner either sells the whole, or only his share; if the whole, he did it without an authority or power for doing so; and if he only sells his share, which is only what he can do, he has nothing to pay to his co-partner: L. 55. tit. 5. P. 5., declares more than this: it is there said, that the other partner has the right to purchase his partner's share at the price offered by the stranger (*el derecho de tanteo*).

<sup>14</sup> The purchaser being ignorant of the fact. See L. 14. tit. 5. P. 5., cited.

<sup>15</sup> Then, says L. 14. tit. 5. P. 5., cited, the contract subsists, although the vendor shall be obliged to pay the vendee for all the injury and damages that may have resulted to him by reason thereof.

<sup>16</sup> But observes *Palacios*, nothing in this case should be added to the price on account of spiritual things, or those annexed to them, for it would be simony.

the circumstances<sup>17</sup> mentioned in L. 2. tit. 14. and L. 3.<sup>18</sup> tit. 13. P. 1. [L. 2. tit. 14. and L. 3. tit. 13. P. 1.] 2d, Public things of a town or corporation, L. 15. tit. 5. P. 5. [L. 15. tit. 5. P. 5.] 3d, The free man, L. 15. tit. 5. P. 5. 4th, The columns or pillars, beams (*maderos*), or other things which support any useful building, cannot be removed from their situation to be sold, L. 16. tit. 5. P. 5. [L. 16. tit. 5. P. 5.] 5th, Poisonous things, unless they are sold with that moderation and rule which the art of medicine requires for its use, L. 17. tit. 5. P. 5. [L. 17. tit. 5. P. 5.] 6th, That the *judges* and *corregidores* or any of their family, cannot purchase an estate (*heredad*) in their jurisdiction, but only what is necessary for their support,<sup>19</sup> L. 5. tit. 5. P. 5. [L. 5. tit. 5. P. 5.] 7th, That no office of jurisdiction or government can be purchased, Ll. 7. and 8. tit. 7. lib. 2. Rec.<sup>20</sup> [Ll. 5. and 6. tit. 12. lib. 5. Nov. Rec.]

§ 3. To this place also belong the sales and purchases which, by different laws of the kingdom, can only be made under certain limitations; such as, 1st, Early corn (*pan adelantado*), which cannot be purchased but at the price it shall be worth in the chief town of the district, L. 17. tit. 11. lib. 5. Rec. [L. 1. tit. 19. lib. 7. Nov. Rec.]; for the purchase of which the public granaries of the kingdom are to be preferred, L. 18. tit. 11. lib. 5. Rec. [Ll. 2. tit. 19. lib. 7. and 10. tit. 13. lib. 10. Nov. Rec.] 2d, That no person can buy up wheat, barley, &c., to resell, except the carriers who live by carrying wheat from some parts to others; but they ought not to gather it up in barns, nor to put it under ground to keep (*ni ensilarlos*), L. 19. tit. 11. lib. 5. Rec.<sup>21</sup> [L. 3. tit. 19. lib. 7. Nov. Rec.] 3d, That it is prohibited to purchase up tares (*algorrabas*), irons (*yeros*), and salt, to resell, Ll. 24. and 25. tit. 11. lib. 5. Rec. [Ll. 7. and 8. tit. 5. lib. 9. Nov. Rec.] 4th, That no one who purchases silk in pod (*en capullo*), or bundle (*mazo*), can resell it, except woven or dyed, L. 25. tit. 12. lib. 5. Rec. [L. 6. tit. 5. lib. 9. Nov. Rec.] 5th, That live food cannot be sold in [191] the same market (*feria*) in which it shall be bought, L. 7. tit. 14. lib. 5. Rec. [L. 4. tit. 7. lib. 9. Nov. Rec.] 6th, That it is not lawful to purchase provisions or necessities to resell in the court and five leagues round about,<sup>22</sup> Ll. 1, 2, 3, 4, 5, and 6. tit. 14. lib. 5. Rec. [Ll. 6, 7, 8, 9, 10. tit. 17. lib. 3. Nov. Rec.] 7th, That the sale of silks, cloths, &c., ought to be regulated according to the good economical

<sup>17</sup> By the prelates, with the consent of the chapter, in the modes pointed out by L. 2. tit. 14. P. 1. cited, but the gifts of the kings or queens to the church cannot be alienated. See L. 8. tit. 15. P. 1., as to the transfer of the right of presentation.

<sup>18</sup> This law relates to the right of burial.

<sup>19</sup> *Para comer ó para beber, ó para vestir.* See L. 5. tit. 5. P. 5., cited.

<sup>20</sup> The laws cited in the text, Ll. 7. and 8. tit. 7. lib. 2. Rec.; which are Ll. 5. and 6. tit. 12. lib. 5., Nov. Rec., do not apply; and it is supposed, L. 8. tit. 2., and L. 7. tit. 3. lib. 7. Rec., are meant, which correspond with L. 8. tit. 4., and L. 9. tit. 5. lib. 7. Nov. Rec., which see.

<sup>21</sup> This and the subsequently cited laws in this part of the text, are acts to prevent forestalling, regrating, engrossing, &c.

<sup>22</sup> See the cases in which it is permitted, in L. 7. tit. 17. lib. 3. cited. L. 5. tit. 14. lib. 5. Rec., cited in the text, is not inserted in the Nov. Rec.

dispositions which are fully expressed in tit. 12. lib. 5. Rec.,<sup>23</sup> and according to the last regulations of commerce. 8th, That the purveyors of fish can only take a supply to last for two days from the retailers (*revendedores*), L. 20. tit. 18. lib. 5. Rec. [L. 11. tit. 13. lib. 10. Nov. Rec.] 9th, That the people may take from the contractors (*arrendadores*) the half of the bread they contract for (*de su arrendamiento*), at the same prices at which they contract, L. 12. tit. 11. lib. 5. Rec. [L. 4. tit. 19. lib. 7. Nov. Rec.] 10th, That wool purchased to be carried out of the kingdom may be taken at the same price,<sup>24</sup> L. 48. tit. 18. lib. 6. Rec. [L. 16. tit. 13. lib. 10. Nov. Rec.] 11th, That the merchants cannot sell in the suburbs, L. 9. tit. 1. lib. 7. Rec. [L. 1. tit. 22. lib. 7. Nov. Rec.] 12th, That the old clothes dealers may not purchase at public auctions, L. 17. tit. 12. lib. 5. Rec. [L. 4. tit. 12. lib. 10. Nov. Rec.] 13th, That there may not be any brokers of cattle (*corredores de ganados*) at the fairs, L. 8. tit. 14. lib. 5. Rec. [L. 5. tit. 7. lib. 9. Nov. Rec.,] and brokers of merchandise cannot purchase, sell, nor make contracts respecting their own merchandise, L. 26. tit. 11. lib. 5. Rec. [L. 4. tit. 6. lib. 9. Nov. Rec.] 14th, That no forestaller or regrater may go out on the high roads, out of the gates, &c. to buy by wholesale, in order to sell by retail, goods which are brought to the capital (*corte*), *Auto* 2. tit. 14. lib. 5. Rec. [L. 15. tit. 17. lib. 3. Nov. Rec.] 15th, That no regrater may buy goods from the manufactories (*de fabricas*) in order to retail, *Aut.* 1. tit. 14. lib. 5. Rec.<sup>25</sup> [L. 9. tit. 5. lib. 9. Nov. Rec.] 16th, That the sale of provisions and warlike stores to the enemies of our holy faith is prohibited, under the penalty of treason, L. 22. tit. 5. P. 5. [L. 22. tit. 5. P. 5.]

Under this axiom ought to be comprehended, 1st, The sales by [ 192 ] the laity of lands in mortmain (*de legos á manos muertas*) which pay upon the duty (*alcabala*) the fifth of their value, which John the II. imposed very abundantly (*á mayor abundamiento*) the 13th April, 1459, as a tribute and charge on the same lands,<sup>26</sup> *Auto* 1. tit. 10. lib. 5. Rec. [L. 12. tit. 5. lib. 1. Nov. Rec.] This is the duty or tax (*derecho*) on mortmain, which the Cortes wished to increase to the third, following the example of Valencia, as is to be seen in the petition of the Cortes of Madrid, of 1534. 2d, The sales which are cov-

<sup>23</sup> The laws of this title of the *Rec.* (*sale of brocades*) are scattered through titles 4. 5. 6. lib. 9. tit. 23. 24. lib. 8. and tit. 12. and 13. lib. 10. Nov. Rec.

<sup>24</sup> L. 16. tit. 13. lib. 10. cited, says, half may be taken away by any inhabitant on application, for and through judicial assistance from the intended exporter, by paying him the same price at which he purchased the wool.

<sup>25</sup> The policy of the above laws, in this part of the text, is, to use a moderate designation, very questionable, and the punishment for their infraction will, perhaps, be generally considered disproportionately and unnecessarily severe. In England, the general penalty for forestalling, regrating, and engrossing, offences by common law, (for all the statutes concerning them were repealed by 12th Geo. 3. c. 71.) is, as in other minute misdemeanors, discretionary fine and imprisonment. See 4th vol. *Blac. Com.* ch. 12. p. 158. 159.

<sup>26</sup> See note (3) tit. 5. lib. 1. Nov. Rec.

erty made to the injury of the royal treasury, on account of tribute, tax, &c., of which L. 59. tit. 5. P. 5. [L. 59. tit. 5. P. 5.] speaks.<sup>27</sup>

[ 192 ] From the third axiom it follows, 1st, That the price of the thing will be certain, if it be left to the determination (*à arbitrio*) of a third person, and he should specify or fix it; by which decision the parties ought to be bound,<sup>28</sup> unless the price fixed should be disproportionate, in which case, it ought to be reformed by the judgment or award (*juicio*) of good men; L. 9. tit. 5. P. 5. [L. 9. tit. 5. P. 5.] 2d, That the sale will be valid in which the contracting parties should have agreed upon the price, with reference, or agreeably (*arreglado*) to the amount of a sum of money deposited in a particular box, bag, &c., if any part of it should be found there, but not if there should be none, L. 10. tit. 5. P. 5. [L. 10. tit. 5. P. 5.] 3d, That the price is certain when the thing is sold for as much as it was purchased for, if there's a certainty as to its having been at first purchased,<sup>29</sup> L. 10. tit. 5. P. 5. [L. 10. tit. 5. P. 5.] 4th, That the sale is not valid the price of which was left to the determination of one of the parties, or of an uncertain person,<sup>30</sup> L. 9. tit. 5. P. 5. [L. 9. tit. 5. P. 5.]

By the fourth axiom, it is demonstrated, 1st, That the purchaser ought to pay the price promised, and the vendor deliver the thing which is sold, with every thing accessory to it, fruits ungathered (*pendientes*), &c. L. 28. tit. 5. P. 5. [L. 28. tit. 5. P. 5.] *Guzman, de Evict.* quest. 21. n. 50, and therefore if a house be sold, it passes to the purchaser with all the materials which compose it,<sup>31</sup> except those which should not belong to the vendor, and the furniture (*muebles*) and stock (*animales*), which he might raise or have there, Ll. 29 and 30. tit. 5. P. 5. [Ll. 29 and 30. tit. 5. P. 5.] But if a plantation of olives (*olivar*) is sold, the press (*lagar*), mill, &c., which should be there, do not pass to the purchaser, unless it is expressed in the contract,<sup>32</sup> L. 31. tit. 5. P. 5. [L. 31. tit. 5. P. 5.] 2d, That all the covenants and conditions ought to be observed by both parties, provided they be not opposed to the laws of the kingdom or good manners, L. 38. tit. 5. P. 5. [L. 38. tit. 5. P. 5.] 3d, That the covenant that the sale shall be dissolved or annulled, if the purchaser does not pay the price<sup>33</sup>

<sup>27</sup> And by the same law 5. tit. 59. P. 5. if the purchaser is privy to, or cognisant of the fraud, he shall forfeit or pay to the crown, out of his own property, the amount which he paid, or was to pay, for the property so purchased. See also L. 3. tit. 7. lib. 10. Nov. Rec.

<sup>28</sup> If the person, to whom it was left to fix a price, should die before determining it, the sale would not be valid. See L. 9. tit. 5. P. 5. *al fin*.

<sup>29</sup> But if it should have come to the seller as a gift, devise, &c., the sale, it appears, would not, under the proposition in the text, be valid. See L. 10. tit. 5. P. 5. cited, *al fin*.

<sup>30</sup> Or of an uncertain person. This is not stated in the law, but by Gl. 3. *Greg. Lop.* on this law.

<sup>31</sup> Not fixtures, which go to the purchaser. See what are, and what are not considered appurtenances and fixtures, in Laws 29 and 30. tit. 5. P. 5. cited.

<sup>32</sup> Or unless expressly put in the place for the use or purpose of taking off the crop. See the law cited.

<sup>33</sup> Or the greater part of it. See L. 38. tit. 5. P. 5. Therefore it is presumed the sale could not be annulled against the will of the purchaser, if the greater part of the price, or consideration, were paid by him, and that the vendor would be left, in such case, to his

at a day appointed, is valid;<sup>34</sup> in which case, if the purchaser does not fulfil his agreement, the earnest money which might have been paid by him, will be the vendor's; but then the fruits gathered or received from the property, are the purchaser's.<sup>35</sup> But the demand of the rest of the price or the revocation of the sale, depends upon the will of the vendor, who shall not be able to retract or repent when he has once made his election; and in case of the sale being revoked, the purchaser is responsible for the deterioration which the property shall have suffered by his fault, during the time it was in his possession, lib. 38. tit. 5. P. 5. [L. 38. tit. 5. P. 5.] 4th, That the covenant (*pacto*) *addictionis in diem*, is valid; which is, when the thing is sold under a covenant that, if within such a time a person [ 193 ] should be found, who would give more, or would better the purchase, it may be given to this better offerer (*mejorador*), and then the seller ought to make known to the purchaser, the bid or the melioration proposed, who if willing to pay or do the like (*arreglandose á esta*), shall keep the property, but not doing so, it shall pass to the highest bidder, the first purchaser restoring the fruits which he hath gathered or received, provided he be paid the expenses of taking off the crop (*de la cosecha*.) But if this bid should be made fraudulently, through the artifice of the seller, the sale shall not be set aside, L. 40. tit. 5. P. 5. [L. 40. tit. 5. P. 5.] 5th, That the covenant that the thing purchased shall be at the risk of the vendor, before delivery is valid, L. 39. tit. 5. P. 5. 6th, That the covenant of resale (*retrovendendo*) is lawful, when the seller reserves to himself or to his heirs, the right of buying back again the thing sold for the same price which he received for it, and the purchaser not complying with it, shall pay the damages and penalties which might have been agreed upon, L. 42. tit. 5. P. 5. [L. 42. tit. 5. P. 5.] 7th, That the covenant to pay a certain penalty to the vendor, if the purchaser or his heirs should aliene the thing sold to any of the persons to whom they might be prohibited by the contract to sell it, is valid,<sup>36</sup> L. 43. tit. 5. P. 5. [L. 43. tit. 5. P. 5.] 8th, That in the conditional sale, if the vendor or

action, to recover the balance or remainder due: at any rate, that if the sale could be so assailed, the vendor would be obliged to return to the purchaser the part of the purchase money so paid, the latter accounting for the fruits or crops immediately received by him, subject to deduction for necessary expenses, as well as those which have been incurred by him for the benefit of the property. See L. 44. tit. 28. P. 3.

<sup>34</sup> This, says *Palacios*, is the *pacto de la Ley comisoria*, which is valid, differently from that which is called *pacto comisoria*, which consists in a person's mortgaging or pledging his property, under a covenant, that if he does not redeem it by a certain day, it shall be the mortgagee's for what he lends or gives on it: which contract is not valid, L. 41. tit. 5; and L. 12. tit. 13. P. 5. See also note,<sup>12</sup> p. 140, *ante*.

<sup>35</sup> The fruits are the vendor's, and it is only in case that the vendor should not wish to return the earnest money (*senal*), or the part of the purchase money which should have been received by him, that the purchaser shall be able to retain the fruits as his own, as is observed by *Palacios*. See L. 38. tit. 5. P. 5.

<sup>36</sup> L. 43. tit. 5. P. 5., cited, says, that a covenant or agreement not to sell or aliene to particular persons is not binding; but that any penalty imposed by the parties to enforce such a covenant, must be paid by the party guilty of its breach.

purchaser dies before the fulfilment of the condition, the heirs are bound to fulfil the contract, L. 26. tit. 5. P. 5. [L. 26. tit. 5. P. 5.]

From the same axiom it is deduced that the injury or benefit which the thing sold undergoes, appertains to the vendor before the contract is perfected; and to the purchaser when once it is perfected, L. 23. tit. 5. P. 5. [L. 23. tit. 5. P. 5.] By injury or deterioration is here understood every injury or loss which may happen to the thing sold by accident and without the fault of the vendor; and by benefit or improvement, every advantage or increase that the thing may receive, L. 23. tit. 5. P. 5.

By this rule we understand, 1st, that the injury and benefit appertain to the purchaser the moment he and the vendor are agreed with respect to the thing and the price,<sup>37</sup> L. 23. tit. 5. P. 5. [L. 23. tit. 5. P. 5.] 2d, That the risk is the vendor's in regard of things which are sold<sup>38</sup> by measure, weight or taste, until they be measured, weighed, or tasted, L. 24. tit. 5. P. 5. [L. 24. tit. 5. P. 5.] unless they should be sold at sight (*á ojo*), then the risk or benefit is the purchaser's, L. 25. tit. 5. P. 5. [L. 25. tit. 5. P. 5.] 3d, That if a certain day be appointed to taste, measure, or weigh them, and the purchaser should not come, thenceforward the thing is at the risk of the purchaser; [194] and if no day be appointed, the vendor will fix the risk upon the purchaser, when having cited or required him, before witnesses, to proceed to measure, &c., the articles the purchaser should not appear for the purpose, and in this case, the vendor has a right to sell the thing to another, and the purchaser shall be responsible for the damages (*daños*) and prejudices which his delay may have occasioned to the vendor; who may at the cost of the purchaser hire a vessel or other thing to supply the want of the one which contains the commodity, if he has occasion for it, L. 24. tit. 5. P. 5. [L. 24. tit. 5. P. 5.] 4th, That in the sales of gold, silver, or the like thing, after the sale is made, if they have not been weighed or measured, the damage that may arise to the thing is at the risk of the vendor; but the increase or diminution of value is the purchaser's,<sup>39</sup> L. 24. tit. 5. P. 5. [L. 24. tit. 5. P. 5.] 5th, That in a conditional sale the deterioration or improvement which happens to the thing before the condition is fulfilled is the purchaser's, but not the risk, L. 26. tit. 5. P. 5. [L. 26. tit. 5. P. 5.] 6th, That the delay of the vendor in delivering the thing

<sup>37</sup> In other words, the contract is perfected or complete by the mere consent of the parties with respect to the object of sale and the price to be paid.

<sup>38</sup> Which are accustomed to be tasted, measured, or weighed before they are purchased. See L. 24. tit. 5. P. 5., cited.

<sup>39</sup> *Palacios* observes, that what L. 24. tit. 5. P. 5. says, and what takes place in this respect, is, that if any of those things should be sold which are accustomed to be sold only by weight or measure, and the whole or a part should be lost before they are delivered to the purchaser, the loss will be the vendor's; but if the thing should be preserved, and the price of the article should in the meantime rise or fall in value, the increase or diminution would be the purchaser's: for this reason, because, as regards the price, it is understood that the contract is already perfected, although it may not be so in respect of the risk, as is said by *Greg. Lop. Gl. 11. L. 24. tit. 5. P. 5.* Note what is there said by *Greg. Lop.*

after the purchase is agreed on and the price is paid,<sup>40</sup> causes the risk and injury of the thing whatever it may be, to fall upon the vendor, L. 27. tit. 5. P. 5. [L. 27. tit. 5. P. 5.]

§ 5. As the vendor is obliged to make the thing sold secure to the purchaser, he is bound to deliver it to him free and discharged from every incumbrance, so that he shall be responsible in case any one should recover it at law from the purchaser;<sup>41</sup> which the common law<sup>42</sup> (*derecho comun*) calls *præstare evictionem*, and we term, to warrant (*sanear*) or secure the thing to the purchaser (*sanear ó hacer sana la cosa*), L. 32. tit. 5. P. 5. [L. 32. tit. 5. P. 5.] *Prestar evicción* or *sanear* in this sense, is to defend (*amparar*) the purchaser or any other who hath been molested or sued at law for any thing he might have received for an onerous consideration or title, the vendor being obliged to undertake its defence (*ó hacer derecho sobre ella*) as though he were in possession of it, L. 33. tit. 5. P. 5. [L. 33. tit. 5. P. 5.] He on whose account any one is disturbed is called the demandant (*autor*), and, therefore, this obligation does not only belong to this contract, but also to all other onerous ones. This warranty or indemnification (*evicción ó saneamiento*) is founded on the following principles: 1st, That all vendors (*autores*) who transfer to another any thing, are obliged to warrant or secure it (*sanearla*.) 2d, That indemnification must be made (*se ha de prestar evicción*) for eviction or recovery of the title by a stranger for a cause which preceded the contract. 3d, That the purchaser or another<sup>43</sup> is bound to give notice to the vendor (*autor*) of the suit which has been instituted for the recovery of the thing. 4th, That these circum- [ 195 ] stances concurring, the person injured has his action to recover from the vendor (*autor*) the damages and prejudices sustained by him. From the first principle it arises, 1st, That warranty (*evicción*) ought to be made in the contract of renting, *Guzman, de Evict.* quæst. 24. 2d, In donation arising from promise, according to common opinion, *Guzman, ibid.* quæst. 25. *á n. 1. al 23.*; but not that which arises from the delivery of the thing, *Guzman, ibid.* n. 25., where, as to which, some limitations will be met with. 3d, In *dote* with respect to those who are obliged to give dote<sup>44</sup> (*dotar*), *Guzman, ibid.* quæst. 26. *á n. 1. al 6.* 4th, In legacies,<sup>45</sup> because the heir is obliged to pay or deliver them to the legatees, *Guzman, ibid.* quæst. 27. 5th, In the thing given in payment, because such a payment is similar to sale, *Guzman, ibid.* quæst. 28. 6th, In exchange, (*permuta*), *Guz-*

<sup>40</sup> The actual tender to the vendor by the purchaser, before witnesses, of the purchase money or price is sufficient. See L. 27. tit. 5. P. 5., cited.

<sup>41</sup> In case of eviction.

<sup>42</sup> That is, the Roman or civil law. See *Castro Disc.* 2. lib. 1. tom. 1. p. 30. *sobre las leyes*.

<sup>43</sup> On behalf of the purchaser must be understood.

<sup>44</sup> Such as parents.

<sup>45</sup> *Palacios* says, this is understood when a general legacy has been bequeathed to the legatee; and it having been delivered or paid to him, he is judicially deprived of it, but not when any particular specific legacy should have been bequeathed to the legatee.



*man, ibid.* quæst. 29. n. 6. 7th, In the partition of property among brothers,<sup>46</sup> because it has the force of exchange, *Guzman, ibid.* quæst. 33. n. 6. But "*eviccion*" does not take place if the parent should have made the division,<sup>47</sup> *Guzman, ibid.* n. 16. 8th, In public judicial sale the creditor ought to warrant<sup>48</sup> (*prestar eviccion*) for the security of the purchaser, L. 50. tit. 13. P. 5. [L. 50. tit. 13. P. 5.] *Guzman, ibid.* quæst. 34., unless the purchaser should know that the thing belonged to another, for then it is understood that he was willing to give the price, *Guzman, ibid.* quæst. 46.

From the second principle, it is deduced, 1st, That warranty is made as well if the entire thing should be sold as though only a part of it should be, L. 35. tit. 5. P. 5. [L. 35. tit. 5. P. 5.] 2d, That if any one should sell his right and actions in regard of any inheritance he shall only make indemnity when the purchaser is evicted of all the inheritance that is considered indivisible, L. 34. tit. 5. P. 5. [L. 34. tit. 5. P. 5.] 3d, That the warranty (*eviccion*) will only take place if the purchaser should have lost the thing by definitive judicial sentence, *Guzman, ibid.* quæst. 15. and 57., where will be seen the limitation to this position; and let it be observed, that the sentence must be executed, *Guzman, ibid.* quæst. 15. n. 37. 4th, That if the purchaser submitted to a voluntary arbitration (*compromiso voluntario*,) and lost the thing by the sentence of the arbitrators, there is no warranty,<sup>49</sup> L. 36. tit. 5. P. 5. [L. 36. tit. 5. P. 5.] *Guzman, ibid.* quæst. 41. 5th, Nor when the thing hath been lost by an unjust sentence of the judge,<sup>50</sup> or by the fault of the purchaser, or if sentence was given when the vendor was not present, L. 36. tit. 5. [196] P. 5. 6th, Neither will there be warranty (*eviccion*), if the purchaser hath lost the thing at play,<sup>51</sup> L. 36. tit. 5. P. 5. [L. 36. tit. 5. P. 5.]

From the third principle it is inferred, 1st, That the knowledge or presence of the vendor is not sufficient, but the suit must be notified to him, *Guzman, ibid.* quæst. 4., where the limitations to this will be found. 2d, This notice must be given in time to be available for

<sup>46</sup> And, adds *Palacios*, amongst those who are not brothers; and this, because the nature of suits or proceedings of partition require it, not because it may or may not have the force of exchange.

<sup>47</sup> *Palacios* says, it will take place in this case, if it appears that the father wished his children should inherit equally, as is said by *Greg. Lop. Gl. 2. L. 9. tit. 15. P. 6.*; and it will also take place if, by reason of his not having granted or required it, either child would be prejudiced in respect of his legitimate portion of the inheritance (*legitima*).

<sup>48</sup> In the later edition of the text, it is said the title ought to be warranted to the creditor for the security of the purchaser. L. 50. tit. 13. P. 5., cited, says, if the property is sold at the instance of the creditor or mortgagor, as the debtor's property, the creditor is not bound to the warranty, but the debtor, except by express covenant, or as is subsequently stated in the text; as also, says *Guzman*, where referred to.

<sup>49</sup> That is, says *Palacios*, if he hath done so without notice to, and the order of, the vendor. See the limitations mentioned by *Guzman*, quæst. 41. cited.

<sup>50</sup> In which case the judge is bound to the warranty or indemnity.

<sup>51</sup> See other exceptions mentioned in L. 36. tit. 5. P. 5., cited. And see Tit. 23. lib. 12. Nov. Rec. against gaming, particularly L. 15. *ibid.*

the defence,<sup>52</sup> *Guzman, ibid.* quæst. 12. n. 8., and L. 32. tit. 5. P. 5. [L. 32. tit. 5. P. 5.] 3d, That then the vendor (*autor*) is bound to defend the defendant,<sup>53</sup> and, therefore, shall be obliged to follow his jurisdiction, although it be an ecclesiastical one, *Guzman, quæst.* 6. *á n.* 1. *al* 7. *y* quæst. 7. *al* n. 15. 4th, That this notice being omitted the vendor is not bound to the warranty or indemnification (*á la eviccion*), unless the purchaser and vendor be both sued, *Guzman, ibid.* quæst. 5. n. 1., or if the purchaser is unable to give it, *Guzman, ibid.* n. 2., or if it hath been dispensed with by express agreement, *Guzman, ibid.* n. 30.<sup>54</sup> 5th, That if the same thing hath been sold to two or more successively, the last purchaser alone can give notice to his immediate vendor, and sue him upon the warranty as his vendor (*autor*), and the first vendor shall not be liable or bound to the second purchaser, unless the latter's vendor (*su autor*), should have ceded or assigned to him his actions, in virtue of which he shall be able to sue as first purchaser, the first vendor, because, otherwise, the personal actions shall not pass to the successor, as *Guzman, ibid.* quæst. 11. fully explains.

From the fourth principle, it follows, 1st, That if the vendor being once required should not assist the purchaser in the defence of the thing, the latter may claim against him the costs of the suit, and the damage (*perjuicios*), *Guzman, ibid.* quæst. 13. *á n.* 1. *al* 23. 2d, That he is obliged to return the purchaser the price or consideration paid for the thing, the damages which may result to him being estimated, L. 32. tit. 5. P. 5. [L. 32. tit. 5. P. 5.] 3d, That if it happened when the vendor made the sale, he bound himself in a penalty to double the amount, if he should not defend the thing according to law, this double amount ought to be estimated according to the value of the thing or property, and not according to the price paid for it, L. 32. tit. 5. P. 5. *al fin.*<sup>55</sup> [L. 32. tit. 5. P. 5.]

Finally, from what has been said, it is evident, 1st, That the vendor is not bound to warranty (*á la eviccion*), if the king by his authority should deprive the purchaser of the thing,<sup>56</sup> L. 37. tit. 5. P. 5. [L. 37. tit. 5. P. 5.] 2d, That even in case of its being agreed that the vendor shall not be bound to warranty or indemnification (*no preste eviccion*), notwithstanding, if the thing be recovered at law from the purchaser, the vendor is bound to return the price or consideration money to the purchaser of good faith,<sup>57</sup> *Guzman, ibid.* quæst. 43.

<sup>52</sup> At latest, says *Palacios*, before the publication of proof. So also says L. 32. and likewise L. 36. tit. 5. P. 5.

<sup>53</sup> Or purchaser.

<sup>54</sup> See also n. 29. and 31. *ibid.*, which last say, notwithstanding, it is to be given from equity.

<sup>55</sup> See *Greg. Lep.* Gl. 8. and 9. on this law.

<sup>56</sup> See the proviso in this law and *Greg. Lep.* Glos. thereon.

<sup>57</sup> Warranty is implied in every case. See what is said by *Wood* in his *Inst. C. L.* book 3. chap. 5. p. 233. on warranty, and compare it with what has been stated with respect thereto in the text.

[ 197 ] Cap. 2. Having already explained the modes by which the contract of sale and purchase is made, we must now state those by which it is annulled or set aside; which also arise from the good faith which should attend this contract as regards the consent, the thing, and the price or consideration.

§ 1. As to what regards consent, we say 1st, That every sale is annulled by the mutual dissent of the parties. 2d, That the contract not being perfected or complete,<sup>58</sup> either of the contracting parties may recede from it, L. 7. and 61. tit. 5. P. 5. [L. 7. and 61. tit. 5. P. 5.] 3d, That after the contract is made, it is of no use to allege it was made through want or indispensable (*forzosa*) necessity, L. 62. tit. 5. P. 5. [L. 62. tit. 5. P. 5.] 4th, That the sale made through fear or force is voidable, L. 56. and 62. tit. 5. P. 5. [L. 56. and 62. tit. 5. P. 5.] 5th, That the purchase and sale in which fraud or deceit (*engaño ó dolo*) intervenes on the part of the vendor is not valid; but if this fraud should have occurred on the part of the purchaser in concealing any circumstance with respect to the thing, the contract subsists, but he ought to pay to the vendor the damages and prejudices which may result to him from this dole,<sup>59</sup> L. 57. tit. 5. P. 5. [L. 57. tit. 5. P. 5.] 6th, That the sale is annulled if either of the contracting parties should not observe the covenants and conditions which were agreed upon at the time of making the contract, L. 58. tit. 5. P. 5. [L. 58. tit. 5. P. 5.]

§ 2. This deceit or fraud may happen from the concealment of certain circumstances, on account of which it is presumed that the purchaser would not have given his consent. Thus, therefore, in every contract of sale, every incumbrance (*carga*) or fault or defect

<sup>58</sup> In a manuscript copy of *Dr. Halifax's Lectures on the Civil Law*, in the possession of the translator, which, it is believed, have never been printed, although an analysis of them has, it is said, ch. 18. on *consensual contracts*, book 2. that this contract, *emptio venditio*, was perfect as soon as the price of the thing to be sold was agreed upon, whether the money was paid or not, and in payment it was consummated. For whatever was taken as *arra* or *earnest*, only served as a proof. It was therefore so far completed by consent alone. L. 7. tit. 5. p. 5., in the first part, says, that the purchaser having given *señal* or earnest, if he afterwards repents, loses the earnest or *arra*; and that if the vendor repents, he forfeits double the amount of the *arra* or *señal* paid, and the sale will not be afterwards valid. But *ad fin.* that if when the purchaser gave or paid the *señal*, he declared to give it as part of the price, or by way of consent (*otorgamiento*), he cannot afterwards repent nor rescind the sale. See *Greg. Lop. Gl.* on this law. L. 61. *ibid.* also quoted in the text, says, that the vendor, after the sale should be made, cannot repent, although he should be willing to pay the purchaser double the amount of the price or consideration, unless with the consent of the latter.

<sup>59</sup> *Palacios* observes, that in order to understand what the authors wished to say in this part of the text, what is stated by L. 57. tit. 5. P. 5. cited, ought to be known; which is, that if one should fraudulently, or through deceit, induce another to sell a thing which he was not desirous to sell, nor of which he knew the value, nor had seen, this sale would be null. But if he was desirous to sell it, and the fraud should consist in the concealing from the vendor any thing accessory or belonging to it, the sale would be valid, although the purchaser would be bound to make reparation for the fraud; as though it should say, that if the fraud or deceit is the cause of, and inducement to the sale, the contract is null; but that if the fraud intervenes incidentally, or accompanies accessorially the contract, it then is valid, according to the tenor of the different cases touched upon above.

(*tacha*) which the thing has, must be clearly expressed or made known; *ex. gr.* if the thing or estate is liable or subject to any service (*servidumbre*) or annuity (*censo*); if the particular estate produces grass injurious to cattle; if animals<sup>60</sup> labor under any vice or infirmity, &c. In the first two cases the sale may be annulled without limitation as to time; the vendor being obliged to return the price, and make amends for the damages and prejudices, unless he should prove that he was ignorant, at the time of the contract, of the faultiness or defect of the thing; for then he is only obliged to return the price, L. 63. tit. 5. P. 5. [L. 63. tit. 5. P. 5.] But, in the third case, a demand must be instituted against the vendor within six months in order to get back the price; and after these have elapsed, the purchaser has six months longer, until the completion of the year, to bring [198] his action to demand that so much of the price may be returned as the beast shall be less valuable on account of the fault or defect which was concealed in the sale; from which time these two periods of limitation are counted. But if the vendor should make known the defect (*tacha*), and the purchaser should notwithstanding consent, he shall not be able to revoke the contract, L. 66. tit. 5. P. 5. [L. 66. tit. 5. P. 5.] *vide Guzman, ibid.* quæst. 61.

§ 3. In what respects price, we have before said that it ought to be just; and, consequently, that the sale may be annulled if there was *lesion enorme*, or fraud, in an excess of half the just price, as well on the part of the vendor as of the purchaser,<sup>61</sup> L. 56. tit. 5. P. 5. [L. 56. tit. 5. P. 5.]

From this principle it follows, 1st, That if the purchaser or the vendor should be prejudiced by this *lesion*, the contract ought to be amended or annulled within four years, if the thing exists without having undergone much deterioration, L. 56. tit. 5. P. 5. and L. 1. tit. 11. lib. 5. Rec., [L. 56. tit. 5. P. 5. and L. 1. tit. 1. lib. 10. Nov. Rec.] which extends to all onerous contracts; and does not take place when purchasers are compelled to purchase,<sup>62</sup> L. 6. tit. 11. lib. 5. Rec. [L. 2. tit. 1. lib. 10. Nov. Rec.] 2d, That notwithstanding this *lesion*, the sale will be valid, if the contracting parties agreed and bound themselves by an oath that it should be valid, except if any one of them were under 14 years of age, L. 56. tit. 5. P. 5. [L. 56. tit. 5. P. 5.] 3d, That all contracts celebrated between persons above twenty-five years of age, although there may be deception in the price (*engaño*) not exceeding half the just value, are valid, provided there be no fraud<sup>63</sup> (*dolo*), L.

<sup>60</sup> Also slaves. See L. 64. tit. 5. P. 5.

<sup>61</sup> Unless the vendor or purchaser, says *Palacios*, referring to L. 56. tit. 5. P. 5. and L. 2. tit. 1. lib. 10. Nov. Rec. is willing to make good the deficiency, or reduce the excess.

<sup>62</sup> And see also the exceptions in the case of property sold publicly by appraisement, *ad fin.* L. 2. tit. 1. lib. 10. Nov. Rec. Such, it is presumed, as is sold at judicial sale. See *Azevedo and Matienzo* on L. 6. tit. 11. lib. 5. Rec.

<sup>63</sup> That is, fraud in the contract. See L. 3. tit. 1. lib. 10. Nov. Rec., cited. What is here laid down in the text, does not appear very reconcilable with what preceded it, nor with what is stated in L. 2. tit. 1. lib. 10. Nov. Rec. The apparent inconsistency may, perhaps, be thus explained. If deceit was the cause of the contract, and the inducement

57. tit. 5. P. 5. and L. 2. tit. 11. lib. 5. Rec. [L. 57. tit. 5. P. 5. and L. 3. tit. 1. lib. 10. Nov. Rec.] 4th, That artisans cannot allege this *lesion*,<sup>64</sup> by reason of the skill which they are supposed to possess, L. 3. tit. 11. lib. 5. Rec. [L. 4. tit. 1. lib. 10. Nov. Rec.]

§ 4. In what relates to the thing or property sold, the sale may be set aside when there exists the right of *retracto ó tanteo*, by which, if the person possessing the right (*el retrayente*) offers the same price as was agreed upon, the contract ought to be revoked. Some persons may retract (*retraer*) by reason of the quality or nature of the thing which hath been sold, and others by reason of the quality of the person. The first are, 1st, The direct lord or proprietor (*señor directo*), or the person who has a share in the thing sold,<sup>65</sup> who ought to be preferred to the relations when their claims come together, L. 13. tit. 11. lib. 5. Rec. [L. 8. tit. 13. lib. 10. Nov. Rec.] 2d, The partner in the common property, L. 14. tit. 11. Lib. 5. Rec. [L. 9. tit. 13. Lib. 10. Nov. Rec.]

Those who possess the right of *retracto*, by reason of the quality [ 199 ] of the person, are, 1st, The nearest relation<sup>66</sup> in the sale of a patrimonial or ancestral estate, and if there are two of equal degree, they shall divide the estate between them, L. 13. tit. 10. Lib. 3. *Fuero Real*. and L. 7. tit. 11. lib. 5. Rec. [L. 1. tit. 13. lib. 10. Nov. Rec.] 2d, If this sale should be made to a stranger,<sup>67</sup> the nearest relation must make use of or exercise this right within nine days, swearing that he wants the thing for himself; and not being disposed<sup>68</sup> to exercise or avail himself of his privilege, this right passes to the next in degree, L. 12. tit. 11. lib. 5. Rec., [L. 7. tit. 13. lib. 10. Nov. Rec.] which alters in this part, L. 7. tit. 11. lib. 5. Rec. [L. 1. tit. 13. lib. 10. Nov. Rec.] 3d, these nine days run against absent minors<sup>69</sup> by way of prescription, without their being admitted afterwards to claim although they may allege the right of restitution in *integrum*, L. 8. tit. 11. lib. 5. Rec. [L. 2. tit. 13. lib. 10. Nov. Rec.] 4th, The son of the vendor is preferred to his uncle, L. 8. tit. 11. lib. 5. Rec. [L. 2. tit. 13. lib. 10. Nov. Rec.] 5th, This right takes place or holds

to it, the contract is void. If it was in the contract itself (by buying and selling too dear or too cheap), it is not void, but may be made void by action or exception, as of *Redhibitoria* or *Quanto minoris*. See *Wood's Inst. Civil Law*, Book 3. ch. 5. p. 230.

<sup>64</sup> In respect of any work undertaken or done in their respective art or calling.

<sup>65</sup> Also *superficiario*, L. 8. tit. 13. Lib. 10. Nov. Rec. cited. *Palacios* says, *superficiario* is he who possesses a house or building on the soil or ground of another, for which he pays some annual rent (*pension*). *Contractus superficiarius* is a contract, observes *Wood*, in which a man hires ground to build upon at a yearly rent. See *Inst. Civ. Law*, Book 3. ch. 5. p. 239.

<sup>66</sup> Of the vendor, adds *Palacios*, provided he be within the fourth degree. Whether this computation is to be according to the canon or civil law, is a question which has its several various supporters; and there being no declaratory law to the contrary, the Learned Professor gives his assent to the computation of the canonists.

<sup>67</sup> And also if it should be made to a relation, says *Palacios*, according to the common opinion.

<sup>68</sup> Or able. See L. 7. tit. 13. lib. 10. Nov. Rec. cited.

<sup>69</sup> Against minors and absent persons. See L. 2. tit. 13. lib. 10. Nov. Rec. cited.

with respect to sales at public auction,<sup>70</sup> the person who exercises it paying the costs, diligences, &c., L. 9. tit. 11. lib. 5. Rec. [L. 4. tit. 13. lib. 10. Nov. Rec.] 6th, If many things belonging to an ancestral estate be sold for one price, all ought to be taken or none; but if they be sold for different prices, one may be taken without the other,<sup>71</sup> L. 10. tit. 11. lib. 5. Rec. [L. 5. tit. 13. lib. 10. Nov. Rec.] 7th, If the thing be sold on credit, it may be taken on giving security within the nine days to pay the price for which it was agreed to be sold, L. 11. tit. 13. lib. 5. Rec. [L. 6. tit. 13. lib. 10. Nov. Rec.] 8th, That this right of *tanteo* by reason of relationship only takes place with respect to property inherited, and not that which the vendor acquired by contract *inter vivos*,<sup>72</sup> L. 15. tit. 13. lib. 5. Rec. [L. 3. tit. 13. lib. 10. Nov. Rec.] 9th, The *hijosdalgo*, according to the custom (*fuero*) of Castille, have this right of *tanteo* or redemption of the property of their ancestors without limitation of time in respect to the property which descended from their father and grandfather *de abuelo arriba*,<sup>73</sup> L. 1. tit. 4. Lib. 4. *del Fuero viejo de Castilla*.

§ 5. When it happens that the purchaser loses the thing judicially, there must be a distinction made between him who may be a *bond fide* possessor, and him who may be so *mala fide*; that is, he who, at the time of the purchase, should know that the thing did not belong to the vendor,<sup>74</sup> The first makes the fruits his own until the day of contestation; but the latter is obliged to restore them, Ll. 39 and 40. tit. 28. P. 3. [Ll. 39 and 40. tit. 28. P. 3.]

With regard to the expenses which both might have incurred, it must be observed that *Garcia de expensis*. cap. 1. num. 10. distinguishes four classes of expenses: The first are necessary, without which the thing will be destroyed, the second profitable or advantageous ones which improve the thing (*mejoran*); the third, those of mere pleasure, such as paintings, &c.; and the fourth, those which are incurred for the purpose of gathering in the fruits.

According to our laws, 1st, As well the possessor *bond fide*, as he

<sup>70</sup> Even though by judicial order. See L. 4. tit. 13. lib. 10. Nov. Rec. cited.

<sup>71</sup> *Palacios* says, *Azevedo*, on L. 10. tit. 11. lib. 5. Rec. excepts two cases, in which one cannot be taken without the other, which see.

<sup>72</sup> *Palacios* says, that *Gomez* on L. 73. *de Toro*, n. 3. is of opinion, that the same takes place in respect of property acquired by the vendor, although it be by contract, *inter vivos*, if he acquired it from his ascendants. As, for instance, if any of them should have made a donation, *propter nuptias*, or should have given any of their property by way of *mejora*; and that it is certain, that the reason there is for its taking place with respect to property inherited, exists for its doing so with respect to the description of property last mentioned.

<sup>73</sup> But not from ascendants farther removed than them. See L. 1. tit. 4. lib. 4. *Fuero viejo de Cast.* cited.

<sup>74</sup> *Palacios* observes, that not only is a person said to possess in bad faith, who knew at the time of the purchase that the property did not belong to the vendor, but if he afterwards comes to know it, and from the time he does know it; and in so much is the latter a possessor in bad faith, that if, after knowing it, he should make any new work on the property purchased, and should be evicted by the lawful owner, he shall not be able to recover the expenses he incurred in respect thereof, L. 41. tit. 28. P. 3.; and in the same manner he shall be obliged to restore the fruits of the property received, L. 39. tit. 28. P. 3.

*malâ fide*, may recover necessary expenses, retaining the thing for the payment, L. 44. tit. 28. P. 3. [L. 44. tit. 28. P. 3.] 2d, Only the possessor *bonâ fide* recovers expenses laid out for the advantage of the property (*provechosas*), Ll. 41, 42, and 44. tit. 28. P. 3. [Ll. 41, 42. and 44. tit. 28. P. 3.] 3d, As also those of mere taste, L. 44. tit. 28. P. 3. [L. 44. tit. 28. P. 3.] 4th, Both may deduct the expenses of the fourth class, L. 42. tit. 28. P. 3. [L. 42. tit. 28. P. 3.] *vide el Garcia, de expensis*, cap. 1, 2, and 5.

## TITLE XIV.

## OF RENTS, RENTING. (DE LOS ARRENDAMIENTOS.)

CAP. 1. THE second onerous contract is that of renting, by [ 202 ] which one person lets or grants to another the service or labor of his person or beast, or the use or enjoyment of a thing, for a certain time, which must be paid in ready money,<sup>1</sup> L. 1. tit. 8. P. 5. [L. 1. tit. 8. P. 5.] Our laws distinguish renting (*el arrendamiento*) from letting (*el alquiler*), applying the term rent to an estate or land (*heredad*), and the latter to a house,<sup>2</sup> a castle, &c., L. 1. tit. 8. P. 5. [L. 1. tit. 8. P. 5.]

§ 1. This contract then consists in three things; in the consent of the parties; in the thing or labor which is rented or let; and in the price. In the first place hence it is, that renting derives its perfection from consent. 2d, that all things capable of use and mechanical

<sup>1</sup> *Vide contra Wood's Inst. C. L.*, p. 236; 1st, *Browne, C. L.* p. 178. It is said in the text, that the price or reward must be paid in ready money; but this appears to be only applicable to the term *loguero*, not *arrendamiento*; which first term may, perhaps, be properly rendered wages, or reward, or remuneration for services or labor, whether of man or beast: for by the civil law, the rent or reward is not, as in the contract of buying and selling, confined to ready money, but is extended to every thing that consists in number, weight, and measure, or in a certain quantity of provisions, or in a portion of the fruit; and *vide* L. 7. tit. 11. lib. 10. Nov. Rec.; and note 1. *Ibid.*, and *nota Greg. Lop.*, L. 4. tit. 8. P. 5. Since the foregoing part of this note was written, the Translator has procured the edition of the text with the notes of *Dr. Palacios*, professor of laws in the University of Huesca, of which it will be seen he has availed himself whenever the transcription of these notes or their substance appeared useful. The Learned Professor observes on this part of the text, that the definition given according to the law cited (L. 1. tit. 8. P. 5.) belongs to *Loguero*. that *arrendamiento*, according to the same law, consists in *renting an estate, or any other thing for a certain rent*: that it is of *Loguero* and of *arrendamiento*, L. 1. tit. 8. P. 5., speaks; and of the word *alquiler* or *alquilar*, that L. 5. *Ibid.*, makes mention. But that in the language or terms of the present time, the term *logar* is unknown, except in some particular towns; where, to agree with a man for his services or labor, to reap, &c., is called *logar*; and *logarse* is said of those who hire themselves, or furnish their labor for wages: that the term *arrendar* is made use of in speaking of renting or leasing an estate or possession; the term *alquilar*, in speaking of the letting or hiring any house, lot of land, or other things, for a certain sum and time; and *ajustar* or *concertar* (to bargain or agree), is said in speaking of work done and performed (*las obras*.) That the word *arrendador*, which the text applies to the *lessor* or person who lets to rent or hire, is applied also by the laws, and without travelling out of this 8th Title of the 5th *Partida*, to the lessee or hirer; and if regard is had to the common acceptance or use of the day, it is more applicable to the latter than to the former; but that, properly speaking, the latter ought to be called *arrendatario* (lessee or hirer). That in *Febrero Reformado*, P. 1. tom. 2. c. 10. § 1. num. 1., the person who lets to rent or hire, is called *arrendatario*; but that this is a mistake. A reference, however, to the 4th edition of *Febrero Reformado*, published at Madrid 1807, tom. 2. Par. 1. cap. 19. § 1. num. 1. p. 1., will show that the learned Professor is deceived, and that the reverse and proper definition is given to the word *arrendatario*.

<sup>2</sup> The word *casas* is made use of in the text; but it is apprehended that this is a typographical error, and that the word *casas* is meant.



labor or serviec, may be rented or hired. 3d, That the price must be just, certain, and in ready money;<sup>3</sup> 4th, That the rentor or lessor is obliged to grant the use of the thing rented, or to perform the labor stipulated, and the lessee or person hiring to pay the price which he promised.

From the first principle it is inferred, 1st, That any one may rent who can sell and buy,<sup>4</sup> the agreement being for a certain time, or for the life of either of the contracting parties, L. 2. tit. 8. P. 5. [L. 2. tit. 8. P. 5.] 2d, That this contract admits every covenant or pact that may not be opposed to the laws and good customs, L. 2. tit. 8. P. 5. 3d, That if the tenant or lessee holds three days beyond the time agreed on, the renting is presumed<sup>5</sup> to continue for another year under the like covenants. But if he should be lessee or tenant of a house, tower (*torre*), or other building, such presumption does not take place, for the reason assigned by L. 20. tit. 8. P. 5. [L. 20. tit. 8. P. 5.]

From the second principle it results, 1st, That all things may be rented or let, from the use whereof we can derive advantage; and also the usufruct of an estate, vineyard, or other like thing, L. 3. tit. 8. P. 5. [L. 3. tit. 8. P. 5.] 2d, The work and labor of others, Ll. 3. 9, 10, 11. tit. 8. P. 5. [Ll. 3. 9, 10, 11. tit. 8. P. 5.]

[ 203 ] From the third principle it arises, That the price or amount of the rent ought to be regulated according to the law or custom of the place,<sup>6</sup> or by agreement of the parties, L. 4. tit. 8. P. 5.,<sup>7</sup> [L. 4. tit. 8. P. 5.,] and as regards the wages of daily laborers, it is provided that they be regulated or fixed by the town councils or corporations,<sup>8</sup> L. 3. tit. 11. lib. 7. Rec. [L. 4. tit. 26. lib. 8. Nov. Rec.] 2d, That it ought to be paid at the time stipulated, and if none be appointed, at the end of the year, L. 4. tit. 8. P. 5., [L. 4. tit. 8. P. 5.,] but the wages of mechanics must be paid daily, L. 4. tit. 11. lib. 7. Rec. [L. 2. tit. 26. lib. 8. Nov. Rec.] 3d, That if the rent be not paid at the appointed time, the landlord or lessor may oust or remove the tenant or lessee, it being always understood that for the satisfaction of the rent he has a tacit mortgage on whatever is found belonging to the latter on the premises rented,<sup>9</sup> L. 5. tit. 8. P. 5. [L. 5. tit. 8. P. 5.]

<sup>3</sup> See note <sup>1</sup> p. 201. *ante*.

<sup>4</sup> *Palacios* says, L. 2. tit. 8. P. 5. specifies various persons, who, though they may buy and sell, cannot take on lease or hire, lands (*campos*). Those are *caballeros* and officers of the king's court; and he refers to tit. 10. lib. 10. Nov. Rec. for information as to those who cannot rent or hire the royal rents, or those of any town wherein they hold or exercise their offices.

<sup>5</sup> It is not only presumed, says *Palacios*, but is positively known, and is clear, according to L. 20. tit. 8. P. 5., cited; and by L. 3. tit. 10. lib. 10. Nov. Rec., farmers and landlords are obliged to give each other notice to quit at the beginning of the last year of the term; if not, the term continues over for another year.

<sup>6</sup> With reference to the time of renting.

<sup>7</sup> In the absence of all which, if the rent is payable yearly, it must be paid at the end of the year; and when it is payable out of the fruits, it is not due before the crop or harvest is reaped. *Vide* the law quoted in the text, and note 1. *Greg. Lop.* on ditto.

<sup>8</sup> Or the wages may be fixed by agreement between the laborers and employers. *Vide* note 1. tit. 26. lib. 8. Nov. Rec.

<sup>9</sup> *Palacios* observes, if they should have been put there with the knowledge of the

4th, That the lessee being punctual in the payment of the rent, cannot be dispossessed or ousted,<sup>10</sup> except in the case expressed by L. 6. tit. 8. P. 5. [L. 6. tit. 8. P. 5.] 5th, That if the thing rented be sold within the term, the lessee ought to give it up; but the vendor is obliged to make good to him a share of the price proportioned to the time that remains to complete the term, unless it shall have been otherwise covenanted.<sup>11</sup>

From the fourth principle it is inferred, 1st, That at the expiration of the term, the thing must be restored to the rentor or lessor; and in case of delay or refusal<sup>12</sup> on the part of the tenant or lessee, he shall restore double the amount,<sup>13</sup> and make good the damages and deteriorations, L. 18. tit. 8. P. 5. [L. 18. tit. 8. P. 5.] 2d, That the tenant or lessee of an estate ought not to pay the rent or price if any calamity, war, fire, &c., should arise, which may destroy the fruits or produce, unless it should have been covenanted to the contrary, or unless this loss may be compensated from the abundance of other years,<sup>14</sup> Ll. 22. and 23. tit. 8. P. 3. [Ll. 22. and 23. tit. 8. P. 3.] 3d, That if the estate produces double fruits, or gives a double return, not by reason of the industry, but by the melioration or augmentation<sup>15</sup> of the thing, the price or rent ought to be doubled, L. 23. tit. 8. P. 5. [L. 23. tit. 8. P. 5.] 4th, That the full annual salary or stipend of schoolmasters must be paid, although they die before the completion of the year, because the instruction was not wanting from their fault. But the heirs of an advocate who should die before the completion of the suit, and those of a mechanic or tradesman who undertook to perform any work, cannot recover the entire wages or price, unless they provide an equally competent advocate or [ 204 ] workman to finish what was begun, L. 9. tit. 8. P. 5. [L. 9. tit. 8. P. 5.] 5th, That the person letting any thing<sup>16</sup> is responsible for the damages which may accrue to the hirer by reason of its inutility or defect, except in the case<sup>17</sup> provided by L. 14. tit. 8. P. 5. [L. 14. tit. 8. P. 5.] 6th, That if the lessors or landlords, or others, by reason of any right that they may possess over the thing rented, of which

owner, referring to L. 5. tit. 8. P. 5. *Quare*, if beasts belonging to the plough, and things necessary to tilling and cultivating the ground of lessee, can be distrained?

<sup>10</sup> Until, says *Palacios*, the term be concluded; and that it is to be observed, that L. 6. tit. 8. P. 5. cited, does not speak of lessees or tenants of estates (*heredades*), but of tenants or lessees of houses.

<sup>11</sup> Or the lease should have been granted for the life of either lessee or lessor perpetually.

<sup>12</sup> L. 18. tit. 8. P. 5. says, until sentence given against him (lessee).

<sup>13</sup> *Palacios* says, the restitution or payment of double the amount, in such case is not practised.

<sup>14</sup> Either former or subsequent. See L. 23. tit. 8. P. 5., cited: provided, adds *Palacios*, according to the law, 22, *ibid.*, the event by which the produce is destroyed should not be one of those accidents often accustomed to happen; and he refers also to *Greg. Lop. Gl. 3.* on the same law; or unless it should be the custom of the place for this loss to belong or attach to the lessee.

<sup>15</sup> That is, accidental. See also *Greg. Lop. Gl. 6.* on L. 23. tit. 8. P. 5., cited.

<sup>16</sup> Such as casks or vessels for holding wine, oil, &c.

<sup>17</sup> With respect to bad grass in a pasture or meadow, of which the lessor was ignorant. See, L. 14. tit. 8. P. 5. cited.

the lessors or landlords were cognisant, should impede or obstruct the lessees or tenants in the use of it, they ought to pay to the latter the damages and prejudices occasioned by such obstruction,<sup>18</sup> L. 21. tit. 8. P. 5. [L. 21. tit. 8. P. 5.] 7th, That the herdsman, or keeper of cattle, shall satisfy the damage done by the animals, which proceeds from his fault, L. 15. tit. 8. P. 5. [L. 15. tit. 8. P. 5.] 8th, That the master workman who shall have undertaken any work by the job or lump, is obliged to do it over again, or to return the price with the damage, if it should tumble down while it is building, or if after it is finished, in the opinion of honest men of his calling, it should be judged faulty and dangerous through his fault, L. 16. tit. 8. P. 5. [L. 16. tit. 8. P. 5.] But if the work should be undertaken under the agreement of paying the price after it is finished, the payment cannot be delayed under the pretext of its not being considered good, because the inspection of skilful persons will be sufficient to destroy this excuse. And if the agreement were to pay on the work being done to the satisfaction of him who ordered it to be done, and that till then it should be at the risk of the workmen, if this approbation should be deferred through the fault of the former, from the period of this delay, all deterioration ought to be at his risk, provided it does not arise from the faultiness or defect of the work, L. 17. tit. 8. P. 5. [L. 17. tit. 8. P. 5.]

Hence it follows, 10th, That the freighter of a ship must pay the value of the thing that shall be laden in it, with all prejudices to the owner of it, if it was endangered or broken by the fault of the former,<sup>19</sup> L. 13. tit. 8. P. 5. [L. 13. tit. 8. P. 5.] 11th, That a carrier of goods is liable to the same penalty, if they be lost through his fault,<sup>20</sup> L. 8. tit. 8. P. 5. [L. 8. tit. 8. P. 5.] 12th, That every error of an artist or professor, from which loss or deterioration may arise to the thing which he took under his charge, induces the obligation, on his part, of satisfying or paying the value of it,<sup>21</sup> L. 10. tit. 8. P. 5. [L. 10. tit. 8. P. 5.] 13th, That if the lessor or lessee should die within the term, the reciprocal obligations pass, or are transferred to [ 205 ] the heirs of both,<sup>22</sup> except that the thing rented were the usufruct of an estate; because being personal, the lease or term will expire with the death of the lessee, L. 2. and 3. tit. 8. P. 5. [L. 2. and 3. tit. 8. P. 5.] 14th, That the owner of a warehouse is not answerable for the things placed there by the tenant or lessee,<sup>23</sup> but he is not by this absolved from the obligation of paying the damages occasioned by his fault or fraud, L. 25. tit. 8. P. 5. [L. 25. tit. 8. P.

<sup>18</sup> See the amplifications and limitations to this contained in L. 21. tit. 8. P. 5. cited.

<sup>19</sup> See L. 13. tit. 8. P. 5. cited.

<sup>20</sup> See also L. 8. tit. 8. P. 5. cited.

<sup>21</sup> This extends to physicians, surgeons, farriers, &c. See L. 10. tit. 8. P. 5. cited.

<sup>22</sup> *Palacios* says, that this is not understood with respect to particular successors, not to those of an entail. And for a clearer comprehension of the difference, he refers to *Gom. var. res. Lib. 2. cap. 3. to Murillo cur. jus. can. this title. Ferraris prompta Biblioth. verb. Locatio; Febrero reformado, p. 1. c. 10. § 1. tom. 2.*

<sup>23</sup> Unless he undertook their charge or custody. See L. 25. tit. 8. P. 5. cited.

5.] 15th, That innkeepers<sup>24</sup> are responsible for the property of their guests, because they ought to exercise hospitality with good faith, and return or justify the confidence placed in them, Ll. 26. and 27. tit. 8. P. 5. [Ll. 26. and 27. tit. 8. P. 5.] 16th, That as the lessee or tenant is obliged to pay the damages which the thing shall sustain while in his possession, in the same way the lessor or landlord ought to satisfy the lessee or tenant for the value of the improvements, which, by his industry, the property rented hath undergone,<sup>25</sup> L. 24. tit. 8. P. 5. [L. 24. tit. 8. P. 5.]

<sup>24</sup> Also owners, &c., of vessels; and this responsibility extends to loss by negligence, theft, &c. See L. 26. tit. 8. P. 5. cited.

<sup>25</sup> *Palacios* says, it must be observed by way of conclusion to this title, that by a royal order of 21st June, 1768, it is forbidden to tenants or leasees to underlet the lands rented to them, which order it is necessary to bear in mind, because *Gomez*, 2 *var. res.* cap. 3. n. 11., and some others allege, that the tenant or leasee may under-let that which was rented to him. The royal order, however, referred to by the Learned Professor, is not found in the *Chronological Index of Pragmaticas*, &c., to the *Nov. Rec.*

## TITLE XV.

## OF PARTNERSHIP OR SOCIETY.

[ 206 ] CAP. 1. THE third onerous contract is that of partnership, which is a union of two or more men, formed with the intention of making gain from their joint stock, associating themselves with one another, L. 1. tit. 10. P. 5. [L. 1. tit. 10. P. 5.]

There is a partnership which is called universal or general, by which all the property of the partners present and future is joined together. The other is particular, as regards certain specific things or objects. All partnership must have for its object an honest and just purpose, and which must not be opposed to good manners or customs, of which examples are given in Ll. 2. and 9. tit. 10. P. 5. [Ll. 2. and 9. tit. 10. P. 5.]

§ 1. Hence proceed the following axioms: 1st, That partnership is a contract which derives all its force from the consent of the partners. 2d, That all profits and losses arising from the things which should be brought into the partnership be common. 3d, That it proceed from good faith.

From the first axiom it follows: 1st, That partnership may be formed, tacitly or expressly, by mere parol agreement, by instrument or deed, by *mensuero*, &c., L. 7. tit. 10. P. 5. [L. 7. tit. 10. P. 5.] 2d, That all persons may enter into it, with exception of the madman<sup>1</sup> and minor under fourteen years; but the minor under twenty-five years has always the right of restitution *in integrum* against the damages or fraud which he may suffer, L. 1. tit. 10. p. 5. [L. 1. tit. 10. P. 5.] 3d, That this contract can only be made for a certain time or for the life of the partners, but never for that of their heirs, unless it be a partnership of rent regarding things belonging to the crown or any corporation, L. 1. tit. 10. p. 5. [L. 1. tit. 10. P. 5.] This does not prevent the heirs from being responsible by reason of the passive actions which their ancestors and members of the partnership transmitted to them, L. 17. tit. 10. P. 5. [L. 17. tit. 10. P. 5.] 4th, That from the day in which the partnership was formed, there is no necessity for a formal delivery of the things, in order to their being considered common to the partners in their use and right of them, except actions of seignory or dominion,<sup>2</sup> and against debtors, for which, in

<sup>1</sup> *Palacios* observes, that every person who cannot consent, by what reason soever it may be, is unable to make this, or any other contract.

<sup>2</sup> *Palacios* says, this means, that if any of the partners should have a seignory or jurisdiction (manorial jurisdiction), the other partners cannot exercise this jurisdiction, unless special power should have been given to them for the purpose. Also, if one partner should have any debts due to him (individually is meant), the other partners cannot demand or sue for those debts, without a like power or authority.

order to their being rendered common, an express power or authority is required from the lord or proprietor, or the creditor, L. 6. [207] tit. 10. p. 5. [L. 6. tit. 10. P. 5.]

From the second axiom it is inferred, 1st, That the distribution or partition of losses and gains may depend upon the will of the partners, provided it be proportioned to the capital or labor of the partners, L. 4. tit. 10. P. 5. [L. 4. tit. 10. P. 5.] 2d, That the partnership called *leonine* is not valid, by which one partner is deprived of all gain, and charged with all loss,<sup>3</sup> L. 4. tit. 10. P. 5. [L. 4. tit. 10. P. 5.] 3d, That if the contracting parties do not determine the gains or losses, they shall be equal;<sup>4</sup> and if the gains are determined, and not the losses, the latter shall be proportioned to the former, and *vice versa*, L. 3. tit. 10. P. 5. [L. 3. tit. 10. P. 5.] That the injuries arising from the fault of any particular partner are chargeable entirely to him,<sup>5</sup> L. 7. tit. 10. P. 5. [L. 7. tit. 10. P. 5.] 5th, That if the determination of these gains or losses be left to the decision of a third person, provided such decision be not conformable to the said rules, it ought to be reformed by experienced persons, L. 5. tit. 10. P. 5. [L. 5. tit. 10. P. 5.] 6th, That in particular or limited partnership, as regards gain or loss, only the things specified enter into communion, L. 7. tit. 10. P. 5. [L. 7. tit. 10. P. 5.]

To the third axiom appertains, 1st, That one partner cannot exact more care from the other than what he bestows on his own property or affairs, L. 7. tit. 10. P. 5.<sup>6</sup> [L. 7. tit. 10. P. 5.] 2d, That this good faith and care ought to accompany all the affairs of the co-partnership, so that the prejudice or loss caused in one firm or branch of commerce by the fault of one of the partners cannot be compensated or set off by the gain which he should make for them in another,<sup>7</sup> L.

<sup>3</sup> *Palacios* here observes, that the partnership in which it is agreed, that one partner shall bear the whole loss, may be valid; and that this is laid down in L. 4. tit. 10. P. 5. which says, *6 se fazen pleyto que perdiesen en la compania en aquellas cosas que usan, que non escize parte en la perdida; tales pleytos como estos valen e deben ser guardados*. Such, he adds, would be the case, where one partner should contribute a thousand dollars capital, and the other partner his labor; with the agreement, that if they lost, the capital so contributed should be lost by the former. *Quære*, however, if the loss should extend beyond the amount of the thousand dollars contributed by the one partner, would not each partner be liable to his moiety or proportion of such excess or loss? The learned Professor concludes by stating, that a partnership is therefore termed *leonine*, when it has been agreed that one partner may have all the gain, and bear no share in the loss, or that all the loss should be his and he should be entitled to no part of the gain, and that this is not valid. It may be observed, that the epithet *leonine*, is taken from the division made by the lion in the fable.

<sup>4</sup> Proportionably, it is presumed, to the goods, &c., brought into the stock. This observation, it is found, is confirmed by *Palacios*, who says that what is above stated, is implied or understood in the text.

<sup>5</sup> But a partner was obliged to observe only the same ordinary care and diligence in the affairs of the partnership which he observed in keeping his own private property, and proof of this being done, would absolve him from the entire or particular loss. *Vide* L. 7. tit. 10. P. 5., quoted in the text.

<sup>6</sup> *Vide* note <sup>4</sup>, *ante*.

<sup>7</sup> This is brought more within the meaning of the law 13, tit. 10. P. 5. cited in the text, than given as the literal translation of the text. See this law, and *Greg. Lop.* Gl. 4. and 5, thereon.

13. tit. 10. P. 5. [L. 13. tit. 10. P. 5.] 3d, That the debts contracted and expenses incurred for the utility of the company, or of him who shall be commissioned in the service of the partners are to be common, L. 16. tit. 10. P. 5. [L. 16. tit. 10. P. 5.] 4th, That when any person is induced by the fraud of another to form a co-partnership, he is not bound to observe the contract after he discovers the fraud; nor to fulfil the covenant of not prosecuting the other on account of it, L. 5. tit. 10. P. 5. [L. 5. tit. 10. P. 5.] 5th, That if partition hath been made by one of the partners of gains fraudulently or improperly acquired, and for this reason he hath been obliged to restore them to the party injured, the partners shall be bound equally to restore the portion which they have respectively obtained in the partition, [208] if they were ignorant of the bad faith of their partner; but if they had knowledge of it, they shall be obliged to satisfy the party aggrieved in equal portions,<sup>8</sup> L. 8. tit. 10. P. 5. [L. 8. tit. 10. P. 5.] It being the duty of persons who form a partnership to act towards one another as brothers, L. 1. tit. 10. P. 5. [L. 1. tit. 10. P. 5.]; it follows, 1st, That on account of debt one partner cannot sue the other for more than he is able to pay, leaving him a sufficiency to subsist on if he has not wherewithal to obtain it, L. 15. tit. 10. P. 5. [L. 15. tit. 10. P. 5.] 2d, That if the administrator of the company<sup>9</sup> should give to any of the other partners their shares without notice to the rest, and the administrator should come to poverty or be insolvent, there shall be another partition made; and if the other partners were aware of it and did not demand in time their proportions, this collation shall not be formed, L. 15. tit. 10. P. 5. [L. 15. tit. 10. P. 5.] 3d, That if any of the partners should take any thing belonging to the company without the knowledge of the rest, he cannot be prosecuted for theft, unless there should exist evident proofs of it, L. 17. tit. 10. P. 5. [L. 17. tit. 10. P. 5.]

§ 2. From these principles it is evident, 1st, That the copartnership is at end by the renunciation of any of the partners; and if this renunciation was made before the term agreed upon, or before the object or business was completed for which the partnership was formed, he is obliged to satisfy the others the damages and prejudices occasioned by reason thereof, L. 11. tit. 10. P. 5. [L. 11. tit. 10. P. 5.] This renunciation ought not to be fraudulent; for if it be proved such, all the profits from thenceforward become common among the other partners, and the losses appertain exclusively to the one who fraudulently renounced, L. 12. tit. 10. P. 5. [L. 12. tit. 10. P. 5.] 2d, That the partnership is also at an end by the natural or civil death of any of the partners, L. 10. tit. 10. P. 5. [L. 10. tit. 10. P. 5.] 3d, By a cession of property, L. 10. tit. 10. P. 5. 4th, By the destruction of

<sup>8</sup> And this whether they have received any part of the gains or not. *Vide* the Law 8. tit. 10. P. 5. quoted in the text.

<sup>9</sup> That is to say, one of the partners administering the affairs of the company. *Vide* the L. 15. tit. 10. P. 5. quoted in the text.

the thing which was the object of the contract, L. 10. tit. 10. P. 5. 5th, By reason of the bad temper or disposition of any of the partners, or the non-observance of the covenants or terms of the contract,<sup>10</sup> L. 14. tit. 10. P. 5. [L. 14. tit. 10. P. 5.] 6th, For the close or discharge of the accounts, the administrator is obliged to present to the company not only the cash book, but also the journal.—*Escovar Muñoz de ratiociniis*, cap. 10. á n. 39. al 41.

<sup>10</sup> These two, says *Palacios*, are not modes of dissolving copartnership, but just causes for the renunciation or separation from it by him who suffers unjustly.



## TITLE XVI.

## OF EXCHANGE OR PERMUTATION.

[ 209 ] CAP. 1. THE fourth onerous contract is that of exchange or permutation. Exchange is to give and deliver a specific or particular thing for another, L. 1. tit. 6. P. 5. [L. 1. tit. 6. P. 5.] To exchange it is not necessary for the things exchanged to be present, nor that the consent of the parties be expressed by word; for the act of receiving the thing by one of the persons bartering will be sufficient,<sup>1</sup> L. 1. tit. 6. P. 5. [L. 1. tit. 6. P. 5.]

This contract bears a total resemblance<sup>2</sup> to that of purchase and sale, L. 2. tit. 6. P. 5. [L. 2. tit. 6. P. 5.] Under this principle we establish, 1st, That no one can exchange who cannot sell and buy, L. 2. tit. 6. P. 5. [L. 2. tit. 6. P. 5.] 2d, That only that can be exchanged which is capable of being purchased,<sup>3</sup> except spiritual things, which, although they cannot be sold, may be exchanged<sup>4</sup> with the permission of the prelate who has jurisdiction over them,<sup>5</sup> L. 2. tit. 6. P. 5. [L. 2. tit. 6. P. 5.] 3d, That when once this contract is perfected by consent, it must be fulfilled,<sup>6</sup> or the interest or damages (*intereses*) paid to the party suffering by him who repents or refuses,<sup>7</sup>

<sup>1</sup> *Palacios* says, that L. 1. tit. 6. P. 5. does not specify any exchange which may not be made by parol. That, by the law, three modes of making an exchange are referred to; and in the third, to which, it appears, the text refers, it thus declares:—"When an exchange is made by parol, which is afterwards fulfilled by the act of both, or one of the parties." Nor can it be said, that by the mere receipt of the thing by one of the parties, without having manifested an intention of making this contract, does an exchange take place.

<sup>2</sup> *Quære.* Vide the difference noticed by *Brown*, 1st vol. book 2. c. 11. p. 371. *Wood's Inst. C. L.* p. 235. By the civil law, exchange was not perfected by bare consent. Actual permutation must take place before the contract was perfect; for from an agreement to exchange, no action arose, (but vide L. 1. tit. 1. lib. 10. Nov. Rec.) nor could the risk be transferred from one to another before actual permutation.

<sup>3</sup> *Palacios* says, it is to be observed, that the property of another person can be bought, and the purchase will be valid to various effects, L. 28. *de contr. empt.* Ll. 51. and 53. tit. 5. P. 5. and which cannot be exchanged, nor would the exchange be valid, L. 1. tit. 6. P. 5. *Cur. Philip. com. ter.* Lib. 1. c. 12.

<sup>4</sup> By other spiritual persons, observes *Palacios*, but not by temporal or lay persons.

<sup>5</sup> But this requisite, the same learned Professor also states, is not alone sufficient; for various are the others, besides this, which are necessary, in order that spiritual things may be exchanged; but he adds, that this belongs to the canonists, and refers to *Murillo curs. jur. can. tit. de ver. permut.* He further observes, that prebends and other ecclesiastical livings (*piezas*;) cannot be bartered without the royal permission, in virtue of the concordate with the court of Rome, the collation and canonical institution to them relating only to the ordinary diocesan. He quotes *Febrero Reformado*, tom. 1. P. 1. c. 17. n. 3. p. 392. 4th ed.

<sup>6</sup> *Quære.* Vide note <sup>2</sup>, *ante*; but also vide, L. 1. tit. 1. lib. 10. Nov. Rec.

<sup>7</sup> *Palacios* confirms what has been observed in notes 2. and 6., which were made before the edition of the text by the learned Professor came under the notice of the translator. He states, that by the law of the *Partidas*, exchange was not perfected by consent alone,

L. 3. tit. 6. P. 5. [L. 3. tit. 6. P. 5.] 4th, That permutation is annulled and extinguished by the same modes and for the same reasons that purchase and sale are, the persons exchanging being bound to the warranty or security (*eviccion*) of the things exchanged, L. 4. tit. 6. P. 5. [L. 4. tit. 6. P. 5.]

Cap. 2. Under these same general rules is found established in Spain the business or traffic termed *colibistica*,<sup>8</sup> or the exchange of letters or bills,<sup>9</sup> which is the permutation of moneys for the purpose of remitting money from one part or country to another, L. 4. tit. 18. lib. 5. Rec.<sup>10</sup> Limiting our discourse to the subject of the exchange of bills, it is evident by its nature, 1st, That for the perfection and fulfilment of this contract four persons intervene. He who draws the bill;<sup>11</sup> he on whom it is drawn;<sup>12</sup> he who delivers or pays the money for it, and he in whose favor it is drawn;<sup>13</sup> although it is possible that these two last circumstances concur in one person.<sup>14</sup> 2d, That when once the bill is presented, by him to whom it is remitted,

or by parol promise (*por palabras*). That when it was made by parol and promise, that is, by stipulation, he who repented, or became unwilling to fulfil the exchange, might be compelled to carry it into execution, or to pay to the other party the damages and prejudices which resulted to him by its non fulfilment. That when it was made by parol, or by *nude pact*, a distinction was made: if one party fulfilled his part, and the other refused to perform his, it was in the election of him who had fulfilled his agreement, either to recover back his thing or property, or to demand the damages and prejudices which resulted to him by reason thereof; but that if neither had delivered the thing agreed, either of them might freely repent, without being able to be forced to the fulfilment of the covenants, L. 3. tit. 6. P. 5.; but that since the passing of L. 1. tit. 1. lib. 10. *Nov. Rec.* the exchange cannot be repented of; and the party is bound to its fulfilment, in whatever way he may have manifested his intention to bind himself.

<sup>8</sup> The translator cannot find an English word for *Colibistica*.

<sup>9</sup> It is not easy to discover the affinity between the doctrine of the contract of exchange, and the doctrine of bills of exchange. The rules of the first are traceable to the civil law, those of the latter are only referrible to the conveniences and refinements of modern commerce. Mr. Justice Blackstone, 2d vol. p. 467. gives credit to China for the introduction, in 1236. It is not a little curious, however, that Wood, in his *C. L.* p. 235. should have fallen upon the same plan as the text. He however admits, that though the contract of bills of exchange hath the name, it hath nothing of the nature of that under which it is mentioned.

<sup>10</sup> Not inserted in the *Nov. Rec.* See Ll. 7. and 8. and note 4. tit. 3. lib. 9. *Nov. Rec.*, which treats of bills of exchange.

<sup>11</sup> The drawer.

<sup>12</sup> Drawee, and after accepting it, acceptor.

<sup>13</sup> Payee.

<sup>14</sup> *Palacios* mentions the following requisites to a bill of exchange. 1st, The date, place, day, month, and year in which the bill is drawn. 2d, The amount or sum for which given, expressed in figures at the head of the bill, and in letters or words in the body of it. 3d, The period at which it is drawn payable. 4th, The name of the person in whose favor it is drawn, who is called the payee (*tomador*). 5th, The person from whom the amount or consideration of the bill is received. This requisite might be well merged, it is conceived, in the 4th, the payee being generally the person who, or on whose behalf the consideration is paid for the bill. 6th, The signature of the drawer. 7th, The name of the person on whom it is drawn, and the place of his residence; i. e. the drawee. He further observes that when the sum expressed in the body of the bill does not correspond with that mentioned in figures at the head of it, regard must be had to the sum set forth in the body of the bill, unless by the letter of advice the contrary appear; and he adds, that when no time of payment is expressed in the bill, but it is simply directory to pay a certain sum, it ought to be understood as payable at sight, or on presentation of the bill. The last rule holds in England. See *Chitty on Bills*, p. 279. ed. 4.

to the person on whom it is drawn, if the latter accepts it, or another for him, they remain bound for the payment; but if the bill be not [ 210 ] accepted, a judicial request having been made by him who presented it, the holder takes out the protest and transmits it to the person who remitted the bill, and the latter may oblige the drawer or giver to return him the amount expressed,<sup>15</sup> L. 9. and 10. tit. 15. lib. 9. Rec.,<sup>16</sup> *Dominguez, de Letras de Cambio*, Lib. 2. Disc. 1. 3d, That on the delivery of the bill of exchange results the irrevocability of the contract, so that the parties cannot secede from it,<sup>17</sup> *Dominguez*, *ibid.* Disc. 8. n. 1, 2, and 3. 4th, That by the acceptance of the bill there is only inferred a tacit consent to pay, and so that no novation nor delegation having taken place, the drawer or giver shall not be absolved from his obligation in respect of him in whose favor it is drawn. From which it is inferred, that if the acceptor should fail, there is a recourse against the drawer,<sup>18</sup> *Dominguez*, *ibid.* Disc. 11. With respect to the acceptances and payments which are made with protest, the reader is referred to *Dominguez*,<sup>19</sup> *ibid.* Disc. 12. and 13. As this business depends principally upon good faith, it has been necessary to protect it with the following provisions: 1st, That bill-brokers (*cambiadores*) be creditable, competent, and responsible, or sufficient people, L. 1. tit. 18. lib. 5. Rec. [L. 1. tit. 3. lib. 9. Nov. Rec.] 2d, That for this trade there must be at least two *bound in solidum*; and that those who are bill traders or brokers cannot hold or carry on any other trade nor commerce,<sup>20</sup> L. 12. tit. 18. lib. 9. Rec.<sup>21</sup> 3d, That no money exchanger or banker may have money that is not current by law, nor more than one set of scales and weights, L. 64. tit. 21. lib. 5. Rec.<sup>22</sup> L. 2. tit. 18. lib. 5. Rec. [L. 12. tit. 12. lib. 9. Nov.

<sup>15</sup> *Palacios* says, that if by the neglect or *laches* of the holder or person to whom the bill is remitted, the time for payment should expire without the bill's having been accepted, and the drawee refuses payment, the holder loses his recourse against the drawer. If the holder presents it at due time, and it is not accepted, he ought to take out the protest for non-acceptance; and in consequence or virtue (*en vista de*) thereof, oblige the drawer to deposit the amount of the bill, to reimburse him, in case the bill should not be paid when it becomes due. That by the mere circumstance of the want of, or of non-acceptance, the drawer cannot be compelled to return the amount of the bill, but he may be to deposit it as above mentioned. The translator must here observe, that the *ordenanza* 23 of Bilbao does not require a deposit, in such case, of the amount, but only directs that in the above case the drawer, on being required, shall be obliged to give the holder security to pay the bill when it becomes due. See also *Suarez*, 1st vol. *Letr. de Camb.* p. 103, 4, 5. n. 172, 3, and 4.

<sup>16</sup> These laws are not in the *Nov. Rec.*

<sup>17</sup> Unless, as observes *Palacios*, before it has been endorsed or negotiated, the drawer and payee should mutually agree to do so.

<sup>18</sup> Unless by the *laches* of the holder he should have lost this recourse against the drawer and endorsers, when he can only look to the acceptor. In the case of due diligence or conduct being observed by the holder, he has his recourse against the drawers and endorsers, without being obliged to attend to the progressive order of endorsement, &c.

<sup>19</sup> There is a more modern treatise on bills by *Suarez* in two vols.; and there are some very good points of information collected in 3d vol. *Febrero adic.* Appendix to c. 18.

<sup>20</sup> *Palacios* says that the practice negatives this.

<sup>21</sup> This law is not inserted in the *Nov. Rec.*

<sup>22</sup> Not in *Nov. Rec.*; and it appears there is no such law in the *Rec.* of 1775.

Rec.] 4th, That no foreigner can be a money exchanger or banker in the kingdom, although he may have letters of naturalization;<sup>23</sup> neither can any such be an exchange broker, whose office ought to be appointed for fairs in places where they are accustomed to be appointed, L. 7. and 11. tit. 18. lib. 5. Rec. [L. 1. and 2. tit. 6. lib. 9. Nov. Rec.] 5th, That bankers cannot take five maravedis per thousand to pay in good money, L. 5. tit. 18. lib. 5. Rec.<sup>24</sup> 6th, That accommodation bills (*cambios secos*) are prohibited under various penalties; such are always considered when persons who borrow money on interest (*tomaren dinero á cambio*) have neither money, credit, nor correspondent in the places on which they borrow it, L. 13. tit. 18. lib. 5. Rec. [L. 4. tit. 3. lib. 9. Nov. Rec.] 7th, That the agreement to borrow money for various successive fairs, so that the interest of the first may enter into the principal sum, and cause other interest on the second,<sup>25</sup> is prohibited, L. 13. tit. 18. lib. 5. Rec. [L. 4. tit. 3. lib. 9. Nov. Rec.] 8th, That the books of money exchangers or bankers (*cambiadores*) and merchants ought to be regulated or kept according to the order and in the mode prescribed by [ 211 ] L. 10. tit. 18. lib. 5. Rec.<sup>26</sup> [L. 12. tit. 4. lib. 9. Nov. Rec.], and the establishment of public banks, according to that directed by L. 5. tit. 18. lib. 5. Rec. [L. 5. tit. 3. lib. 9. Nov. Rec.]; which, among other things, requires the license of the government and sufficient security. 9th, That the exchange, its circumstances, the value of the bills, &c. cannot be proved by the oath of the persons who shall lend the money on interest, but by public instruments, witnesses, &c., L. 13. tit. 18. lib. 5. Rec. [L. 4. tit. 3. lib. 9. Nov. Rec.] 10th, That to the books of bankers, if they are made or kept with due formality, faith is given in<sup>27</sup> their favor, and against them, by reason of their being the depositaries of the public faith; which is not admitted with respect to the books of merchants,<sup>28</sup> *Escobar Muñoz de Ratiociniis*, cap. 11. á n. 7. al 33., where there are various limitations laid down to this. 11th, That money cannot be lent to carry interest, nor to be trafficked with, if the person lending it be not interested in the contracts,<sup>29</sup> L. 15. tit. 18. lib. 5. Rec. [L. 21. tit. 1. lib. 10. Nov. Rec.]

<sup>23</sup> Neither, says *Palacios*, is this observed, since the greater part of the bankers (*cambistas*), in the kingdom, as well in the capital as in the provinces, are Frenchmen, Italians, Irishmen, &c.; and that there are also many foreign exchange or bill brokers. He adds, that in all cases that occur with respect to bills of exchange which are not provided for by the *ordenanzas* of commerce, attention must be paid to practice; the most accredited bankers being consulted thereupon, and the same with respect to towns where there are no *ordenanzas*.

<sup>24</sup> This law is not in *Nov. Rec.*

<sup>25</sup> That is, compound interest.

<sup>26</sup> See also L. 13. tit. 4. lib. 9. Nov. Rec.

<sup>27</sup> *Quære*, if this may not be properly translated, faith is given to their contents for or against the owners.

<sup>28</sup> The books of merchants are entitled to faith, or are proof against them, observes *Palacios*, in the form and cases provided by L. 23. tit. 19. lib. 9. Rec.: this law is not in the *Nov. Rec.* See *Cur. Philip.* lib. 2. cap. 8. *Com. Ter.*

<sup>29</sup> Or perhaps unless they are to share in the profit and loss: "*sino es á pérdida y á ganancia*," says L. 21. tit. 1. lib. 10. Nov. Rec., referred to in the text. See this law.

## TITLE XVII.

## OF CONTRACTS, THE FULFILMENT OF WHICH DEPENDS UPON CHANCE OR CONTINGENCY.

CAP. 1. THE contracts of which we are about to treat in this title, constitute a third class, and among them the principal is insurance, by which one person insures to the other his merchandise against the danger or risk of the sea, or land for a certain price or premium which he receives for it,<sup>1</sup> *Hevia, Curia. Filip. Comerc. Nav.* cap. 14. n. 1. He who takes upon himself this work is called the insurer or underwriter, and he who is insured against it, the insured or assured:<sup>2</sup> with respect to this contract the ordinances of maritime nations vary.

[ 212 ] On the nature of this contract the following axioms are founded: 1st, That those who may contract, or are not prohibited from so doing, may insure. 2d, That all classes or descriptions of merchandise except those prohibited may be insured. 3d, That the clauses of this contract ought to be interpreted strictly, and without extension. 4th, That the insurer is made responsible for the risk by reason of the premium which is paid to him. 5th, That the insured ought to point out all the circumstances of the thing, and give notice of the injury or damage which the merchandise insured may have suffered.

From the first axiom it follows: 1st, That minors, prodigals, madmen, &c., cannot insure. 2d, Nor brokers (*corredores*) of merchandise for the Indies, L. 4. tit. 39. lib. 9. *Rec. de Indas.* [L. 4. tit. 39. lib. 9. *Rec. Ind.*]

From the second axiom it is inferred, that the insurance of goods prohibited as contraband, seized for nonpayment of duty, and those which are without or beyond risk, is not valid, *Hevia, Cur. Phil.* *ibid.* n. 8. 2d, Nor of the property of enemies, or things destined for them, *Wedderkop. Introd. in Jus Nauticum*, lib. 3. tit. 7. § 73. 3d,

<sup>1</sup> *Palacios* observes, that the particular and precise knowledge of what appertains to chap. 1 and 2, of this title depends upon the information which must be respectively afforded by the *ordinanzas* by which each *consulado* is regulated and governed: but that therefore the things which in all places constitute the essence of this contract of insurance must not be omitted; which are 1st, That there be one or many effects which form the matter or ground of it; and that one of the parties have that which may be insured by the other. 2d. That there be risks to which the effects which the assurer takes upon himself to insure, may be exposed, or ought to be exposed. 3d, That there be a determinate or indeterminate sum which the assurer promises to pay to the assured by way of indemnity, in case of the loss of the effects insured by any of the fortuitous events against which the assurer hath insured. 4th, That a certain sum or rate be agreed on, which the assured may pay, or be bound to pay to the assurer, in consideration of the insurance. 5th. The consent of the contracting parties.

<sup>2</sup> The sum which is given as the price or consideration of the risk, says *Palacios*, is called the premium or rate of insurance; and the act extending it, the instrument or policy of insurance.

That according to L. 5. tit. 39. lib. 9. Rec. *de Ind.*, [L. 5. tit. 39. lib. 9. Rec. Ind.,] only two thirds of goods going to the Indies can be insured; and by the *Consulado de Barcelona*, it is permitted to insure the seventh of eight parts, if the owners are natural born subjects; and the third of fourth parts, if they are foreigners, *Capitulaciones del año 1485.*<sup>3</sup> cap. 1. 4th, That the insurance of goods loaded on the other side of the Straits of Gibraltar is not valid, according to the Consulado of Barcelona, *Capitulaciones de 1484.* c. 2. 5th, That the guns and tackle and furniture of the ships of the Indies cannot be insured, L. 5. tit. 39. lib. 5. Rec. *de Ind.* [L. 5. tit. 39. lib. 5. Rec. Ind.] 6th, That the gold and silver which come from the Indies, are not to be insured by the disposition of the *Ordenanzas de Bilbao*, cap. 33.

From the third axiom we deduce, 1st, That when the vessel simply is insured, the goods which she has on board are not understood to be insured, and *vice versa*, *Hevia, Cu. Phi. ibid.* n. 16. 2d, That the things which one has on board his vessel being insured, the insurance only devolves on those which he actually had on board at the time, and not on those which have been afterwards laden, *Hevia, Cu. Phi. ibid.* n. 12. 3d, That if the underwriter insures the goods of a person [213] that is in partnership with another, he is only considered to insure the part or share of the assured, and not that of his partner, unless it should be otherwise expressed, *Hevia, Cur. Phi. ibid.* num. 13. 4th, That if a vessel be insured, it is understood for the first voyage she shall make until she arrive at anchor in the port of her destination, *Hevia, Cur. Phi. ibid.* num. 21. and 22. 5th, That the insurance of one ship cannot be extended to another, *Hevia, Cur. Phi. ibid.* n. 23. 6th, That if one insures a certain quantity of goods, and they were not on board at the time the ship was lost, the underwriter is not bound to pay their value, *Hevia, Cur. Phi. ibid.* n. 17. 7th, That the insurance is not annulled, although the assured may place the goods on board another's vessel (*en cabeza de otro*), in order that it may be understood they belong to the latter, *Hevia, Cu. Phi. ibid.* n. 16.

By the fourth axiom it is established, 1st, That the insurance is not valid until the premium be paid, *Capitulaciones de 1484*, cap. 15., which ought to be paid within two months on insurances to the Indies, L. 11. tit. 39. lib. 9. *Recop. Ind.*, [L. 11. tit. 39. lib. 9. Rec. Ind.,] and within twenty-four hours at the port of Bilbao, *Ord. de contrat. de Bil.* c. 34. 2d, That the risk of the underwriter commences from the time the goods were laden or shipped, until they were unladen at the port or place of destination, *Wedderkop, ibid.* § 82. and 137., and L. 48. tit. 39. lib. 9. *Rec. Ind.* [L. 48. tit. 39. lib. 9. Rec. Ind.,] 3d, That the insurance of goods lost at the time of the contract is null, if the loss should have happened in a place that, reckoning a league for an hour travelling by land, the insurer might have been able to know it. L. 7. tit. 39. lib. 9. *Rec. Ind. Capit. de 1484.*

<sup>3</sup> In the edition of the text edited by *Palacios*, it is 1484.

cap. 17. [L. 7. tit. 39. lib. 9. Rec. Ind.] *Ordenanzas de Bilbao*, cap. 22.<sup>4</sup> n. 25. 4th, That the risk and damage for which the underwriter is responsible, is intrinsic (*el intrinseco*), arising from violence or a fortuitous event, such as tempest, fire, &c., and not that which happens from the interior vice or defect of the thing, *ex. gr.* if wine turn vinegar, or oil become rancid, &c., L. 42. tit. 39. lib. 9. *Rec. Ind. orden. de Bilbao*. (cap. 48. 50, and 65.<sup>5</sup> quoted). [L. 42. tit. 39. lib. 9. Rec. Ind.] 5th, That the insurer is responsible for general average of throwing goods overboard (*echazon*), and expenses incurred for unloading and [214] lightening the vessel, L. 20. and 43. tit. 36. lib. 9. *Rec. Ind. Wedderkop*, *ibid.* § 91. [L. 20. and 43. tit. 36. lib. 9. Rec. Ind.] 6th, That the underwriter is not liable for the damage arising from the fault of the insured, or the captain or pilot of the vessel, *Hevia, Cu. Phi. ibid.* num. 24. *Orden. de Bilbao*, cap. 46.<sup>6</sup> 7th, That if part of the goods were to be found which were believed lost, the insured is bound to receive it on account of the value which the insurer (*asegurado*),<sup>7</sup> is obliged to pay him, *Ordenanzas de Bilbao*, cap. 61.<sup>8</sup> 8th, That the underwriter ought to take care to cause the goods to be valued, and not doing so, it shall depend upon the oath of the insured, L. 41. tit. 39. lib. 9. *Rec. Ind.* [L. 41. tit. 39. lib. 9. Rec. Ind.] 9th, That the premium of insurance is not due, by the vessel that hath not performed the voyage, for the goods which were not embarked or shipped, *Capitulaciones de 1484*. cap. 5.; and this premium may be demanded within fifteen days on insurances to the Indies, L. 12. tit. 39. lib. 9. *Rec. Ind.*, [L. 12. tit. 39. lib. 9. Rec. Ind.] and by the *Ordenanzas de Bilbao*, cap. 38.<sup>9</sup>, the insured ought to notify it to the underwriters rebating the half per cent. of what hath been given or paid. 10th, That the ship which goes to the Indies is considered lost, if within a year and a half no information hath been received of her, L. 8. tit. 39. lib. 9. *Rec. Ind.* [L. 8. tit. 39. lib. 9. Rec. Ind.]

From the fifth axiom it arises, 1st, That he who causes insurance to be made on a vessel, must declare her built, if she was taken in time of war, if she is a very fast sailer, &c., *Wedderkop, ibid.* § 108. 2d, That the insured ought to attend as far as he is able, to the good condition and conservation of the goods, to which end the *Orden. de Bilbao*, cap. 26.,<sup>10</sup> direct that the vessel and its tackle, apparel, and furniture (*aparejos*), be valued, and that the insured incur the risk of twenty-five per cent., in order that he may take more care in providing for the vessel.

Cap. 2. The second contract of this class is maritime interest (*cam-*

<sup>4</sup> The quotation in the text is cap. 31.

<sup>5</sup> This quotation is erroneous with reference to the edition in the possession of the Translator, viz. that of 1813.

<sup>6</sup> Does not correspond with edit. of 1813.

<sup>7</sup> Quare "*asegurador*?" and so it is translated. The Translator since finds in the edition of *Palacios*, that the word in the text is "*asegurador*," as translated.

<sup>8</sup> The Quotation does not correspond with the edit. of 1813.

<sup>9</sup> The Quotation does not correspond with the edit. of 1813.

<sup>10</sup> Do.

*bio maritimo*).<sup>11</sup> In this contract a certain amount or sum is offered on the hull (*cuerpo*) of the ship, or on the goods therein laden, on condition to repay the capital with certain interest in case of arriving safe at their destination. *Wedderkop, ibid.* Lib. 3. tit. 11. § 123. When credit is given on the ship, it is the contract which the French call *contrat à grosse aventure*.

Hence we draw three principles, 1st, That those only who can bind the ship and wares may make this contract. 2d, That the [ 215 ] creditor runs the risk of the ship and the goods. 3d, That, by reason of this risk, he may demand the capital with interest.

From the first of these principles it is inferred, 1st, That those interested are bound in this contract for the value of the vessel and cargo, so that the quantity or amount exceeding it is considered a pure loan (*emprestito*), *Wedderkop, ibid.* § 126.: and according to L. 6. tit. 39. lib. 9. *Rec. Ind.* [L. 6. tit. 39. lib. 9. *Rec. Ind.*] no master can borrow on interest on a vessel which goes to the Indies more than a third part of the value, and with license of the *consulado*. 2d, That the captain can only borrow on interest, if the parties interested be present, with their approbation; and being absent on account of some urgent necessity, as for the repairs of the vessel, &c., *Ordenanzas de Bilbao*, cap. 41.<sup>12</sup>

From the second principle it follows, 1st, That the creditor begins to incur the risk from the time that he made the contract until the vessel hath arrived at the port of her destination, *Wedderkop, ibid.* § 130. 2d, That if the vessel hath incurred risk, not by a fortuitous event, but by varying the due course of her navigation, by arriving at a more distant port than that expressed in the contract, by carrying contraband goods, this ought not to cause any prejudice to the creditor, *Wedderkop, ibid.* § 131.; but it is to be observed that money lent on interest ought not to contribute to make good the damage caused by throwing overboard or jetsam (*echazon*), *Wedderkop, ibid.* § 134. By the third principle it is acknowledged that the interest on maritime loan (*cambio*) ought to be graduated in proportion to the danger and risk of the navigation, *Wedderkop, ibid.* § 132.

Cap. 3. The third contract which depends on chance, is wager, *apuesta*, or a reciprocal promise between two with respect to a conditional doubtful event, past, present, or future.<sup>13</sup> Wagers or bets are

<sup>11</sup> Vide 2d vol. *Black. Commentaries*, p. 457. edit. 1809, *fœnus nauticum*. *Palacios* here takes occasion to observe, that the ignorance, confusion, and informality which took place on the subject of maritime interest, induced the *consulado* of commerce of Barcelona, with its accustomed zeal, to represent the necessity of establishing there a register of maritime interests, which it proposed under eight articles, and which the king was pleased to approve by royal *cedula* of 23d of December, 1795, and that this is a proof of the necessity there is for seeing the laws which govern in each *consulado*, to acquire the corresponding information in these matters.

<sup>12</sup> This quotation does not correspond with the edit. of 1813. vide cap. of ditto 24. n. 26. 37. 38. and 39. on this subject.

<sup>13</sup> *Palacios*, referring to *Ca. Phil.* lib. 3. c. 15. n. 1. says, that a wager is a reciprocal promise which is made between two or more, each laying a wager to the contrary of what the other says, to gain or lose it upon a conditional, doubtful event (although it be with



obligatory, provided that there be no fraud or deception (*dolo*) on the part of any of the contracting parties;<sup>14</sup> see the examples set forth in *Hevia, Cu. Phi. ibid. comercio naval. c. 15.*

respect to a third and uncertain person), past, present, or to come. He adds, that a wager may be also defined a pact between two or more, who dispute upon any doubtful thing, by which it is agreed, that he on whose part that which is assigned is not verified, shall lose any sum or other thing, and the other shall gain it, or a third person, according to the agreement.

<sup>14</sup> Although there be no fraud or deception, says *Palacios*, there are various wagers which are not obligatory. Wagers respecting who shall eat or drink most, and wagers respecting immodest or illicit things are not binding, although there be no fraud or deception. If two lay a wager, and one should know the truth of the thing upon which the bet was made, and should not declare it to the other, who was ignorant of or doubted it, he would not gain the wager.

## TITLE XVIII.

## OF SECURITY.

SURETY is one who engages or promises to another to give [ 216 ] or do something by the order, or at the request of the person on whose behalf he enters into security, L. 1. tit. 12. P. 5. [L. 1 tit. 12. P. 5.] There are conventional and judicial securities. Here we treat of the first class.

From what has been said, we extract three principles, 1st, That suretyship is an accessory contract which requires consent. 2d, That sureties enjoy the benefit of order<sup>1</sup> not to be sued but in default of the principal.<sup>2</sup> 3d, That the surety who paid, alone, has an action against his co-sureties in virtue of the cession of the right of action of the creditor; and the sureties have an action against the principal debtor.<sup>3</sup>

From the first axiom it is deduced, 1st, That every person who can oblige or bind himself may be a surety,<sup>4</sup> L. 1. tit. 12. P. 5. [L. 1. tit. 12. P. 5.] 2d, Bishops, clergymen,<sup>5</sup> friars, cannot be, L. 2. tit. 12. P. 5. [L. 2. tit. 12. P. 5.] 3d, Nor the wife for the debt of her husband, although it should have been converted to her benefit,<sup>6</sup> L. 9.

<sup>1</sup> *Beneficium ordinis sine excussione*.

<sup>2</sup> It appears that judicial sureties do not enjoy this benefit; *vide Pothier; Domat, C. L.*; and 2d vol. *Febrero Adicionado*, p. 162. n. 49.; and *Wood's C. L.*, p. 227. *Palacios*, referring to L. 11. tit. 12. P. 5., says, that the surety who paid the whole debt in the name of the debtor, has no action against the other sureties, but only against the debtor himself: if he paid in his own name, he has it also against the debtor; but he may, if he prefers it, require the creditor to cede to him his actions against the other sureties; to demand from each of them the proportion for which each is respectively liable; this cession is what is termed *carta de lasto*, or cession of actions. That if, when the surety paid, he said not in whose name he did pay, it shall be understood that he paid in his own name, provided he immediately afterwards demanded the cession of actions; but if he did not so immediately demand it, he shall be understood to pay in the name of the debtor.

<sup>3</sup> One benefit of sureties, namely *divisionis*, is omitted. *Vide Wood, C. L.*, p. 227.; and L. 8. tit. 12. P. 5.

<sup>4</sup> *Palacios*, citing L. 23. tit. 21. lib. 4. Rec., which is L. 7. tit. 11. lib. 10. Nov. Rec., says, that laborers or planters (*labradores*,) are an exception to this rule; who, although they may bind or oblige themselves, cannot be sureties unless it is among one and other, and not for others, without their being able to renounce this privilege. See also *nota 1.* tit. 11. lib. 10. Nov. Rec.: which is *auto 8.* tit. lib. 5. Rec.

<sup>5</sup> L. 2. tit. 12. P. 5, observes *Palacios*, says regular clergymen; for, generally speaking, it is permitted to clergymen, although they be of the superior orders, to be sureties for other clergymen for their churches, and for destitute persons; and even when they should enter into security for those for whom they are prohibited to be sureties, the security would be binding in regard to their property, although their superior might punish them for having done so.

<sup>6</sup> But it would appear that when a woman joins in an obligation with her husband, she is liable, *pro ratâ*, according as she hath been proved to have been advantaged; *vide L. 3.*

tit. 3. lib. 5. Rec. [L. 3. tit. 11. lib. 10. Nov. Rec. ;] except in the eight cases mentioned by L. 3. tit. 12. P. 5.<sup>7</sup> [L. 3. tit. 12. P. 5.] 4th, That no one can become security for any minor, if the latter has not the license of his father or curator, L. 2. tit. 11. lib. 5. Rec. [L. 3. tit. 1. lib. 10. Nov. Rec.] cited,<sup>8</sup> which amends or alters, L. 4. tit. 12. P. 5. [L. 4. tit. 12. P. 5.] 5th, That suretyship may be accessory to every obligation, civil and natural, L. 5. tit. 12. P. 5. [L. 5. tit. 12. P. 5.] 6th, That the surety may be bound before or after the principal debtor, at a certain time, under condition, &c. L. 6. tit. 12. P. 5. [L. 6. tit. 12. P. 5.] 7th, That the surety cannot be bound for more than the principal, and this excess may consist in a greater amount, in an inconvenient place, or in a shorter time of payment, or even without condition, L. 7. tit. 12. P. 5. [L. 7. tit. 12. P. 5.] 8th, That the obligation of the surety is extinguished when that of the principal is; and for five causes besides.<sup>9</sup> 1st, If the surety should pay the debt or part<sup>10</sup> of it. 2d, If he should remain a long time bound, which is left [217] to the discretion of the judge to determine. 3d, If, on the arrival of the time for payment, he deposits the money before witnesses. 4th, If the time for which he became bound hath expired. 5th, If the principal debtor dissipates his property, L. 14. tit. 12. P. 5. [L. 14.

tit. 11. lib. 10. Nov. Rec.: except in case of necessities, which the husband is bound to furnish her. She may be surety in respect of debts to the crown; but even though *femme covert* may be surety for her husband in respect of taxes or debts due to the crown by him, she cannot be arrested or imprisoned therefor; nor for any debts of her husband, L. 2. tit. 11. lib. 10. Nov. Rec. See also 6th *Febrero Adicionado*, P. 2. lib. 3. cap. 2. § 3. p. 400. n. 160; also L. 4. tit. 11. lib. 10. Nov. Rec. and App. J.

<sup>7</sup> This law (3. tit. 12. P. 5.), is anterior to that of the *Nov. Rec.* (L. 3. tit. 11. lib. 10.) *Palacios* takes occasion here to remark, that the authors say, that a *femme covert* cannot be surety for the debt of her husband, although it may be converted to her own benefit; and in continuation they except eight cases; one of which is, that she may be so when it is for her own utility or advantage, as may be seen in L. 3. tit. 12. P. 5.; which they cite to this effect. That this is an error or want of explanation: that what is certain is, that the wife, if her being security for her husband is treated of, can be surety for him in no case, by L. 9. tit. 3. lib. 5. Rec.; which is L. 3. tit. 11. lib. 10. Nov. Rec.; and if her being security for a stranger or third person is treated of, although generally speaking, she cannot be so, there are eight cases excepted by L. 3. tit. 12. P. 5. See the law last cited for the excepted cases alluded to, by the Learned Professor. It must be observed, that the above general disability or disqualification of being surety, is not confined to a *femme covert*, but extends to all women. See L. 2. tit. 12. P. 5. The note,<sup>8</sup> to which attention is craved, as it affects the above remarks of *Palacios*, was written before the Translator saw the observations of the Learned Professor; and he, with deference, ventures yet to submit it to scrutiny.

<sup>8</sup> *Palacios* says, that it is doubtless L. 22. tit. 11. lib. 5. Rec., (L. 17. tit. 1. lib. 10. Nov. Rec.): to which the text means to refer; and which, as also what is stated in this part of the text, must be understood, when the minor or child under paternal power (*hijo de familias*), should purchase or borrow any thing on security; as, in such cases, the law annuls the contract, oath, or security, which shall be entered into or given in respect thereof.

<sup>9</sup> For these causes, says *Palacios*, the surety may demand of the judge, that the principal debtor discharge him from the obligation. But it may be here observed, the discharge of the creditor is the object of the surety.

<sup>10</sup> *Quære*, if he pay only part of it, unless he be merely jointly bound with others, and not in *solidum*.

tit. 12. P. 5.] 6th, The security is not at an end by the death<sup>11</sup> of the surety, but it descends to *his* heirs, L. 16. tit. 12. P. 5. [L. 16. tit. 12. P. 5.]

From the second principle it arises, 1st, That if execution go against the principal debtor, and he has not wherewithal to pay, the sureties may be sued; and if it should happen that the debtor should be absent from the place, and the sureties demand time to produce him, it must be granted to them, L. 9. tit. 12. P. 5. [L. 9. tit. 12. P. 5.] 2d, That if the sureties were simply or jointly bound, each can only be sued for his respective part or proportion; and if they have bound themselves each *in solidum*, or for the whole,<sup>12</sup> the creditor may demand the whole debt from whomsoever of the sureties he pleases; but if there be among them any poor persons, the rest must pay the whole,<sup>13</sup> L. 8. tit. 12. P. 5. and L. 1. tit. 16. lib. 5. Rec. [L. 8. tit. 12. P. 5. and L. 10. tit. 1. lib. 10. Nov. Rec.]

On the third principle it is established, 1st, That if the creditor recovered from one of the sureties *in solidum*, he must assign to him his rights and actions, in order that he may recover from his co-sureties their corresponding proportions, L. 11. tit. 12. P. 5. [L. 11. tit. 12. P. 5.] 2d, That sureties in paying have a right to proceed against the principal debtor, unless they have paid with the intention of not demanding it; or if the security conducted to the utility of the sureties; or the sureties became bound against the will or desire of the principal debtor; L. 12. tit. 12. P. 5. [L. 12. tit. 12. P. 5.] 3d, That if one of the sureties paid the whole debt in the name of the principal debtor, he can have recourse against him only, and not against his co-sureties,<sup>14</sup> L. 11. tit. 12. P. 5. [L. 11. tit. 12. P. 5.] 4th, That if any one become bound by order or request (*mundado*) of another, who is not the principal, and any injury should arise to him by reason of such security, he has his action only against the person by whose order or desire he became bound,<sup>15</sup> L. 13. tit. 12. P. 5. [L. 13. tit. 12. P. 5.] 5th, That if the surety could oppose or allege any exception or defence in a suit respecting the debt due by his principal, and he did not do so, he will not be able to recover what he paid on account of the debt,<sup>16</sup> unless this exception should belong

<sup>11</sup> In judicial bail for the appearance of a person accused, the obligation expires, of course, with the death of the party for whom it was given. Vide L. 11. tit. 19. P. 5.

<sup>12</sup> That is, jointly and severally.

<sup>13</sup> And this whether they be only simply or jointly bound, as well as if bound *in solidum*. Vide L. 8. tit. 12. P. 5., quoted.

<sup>14</sup> See what is said in note 1, p. 219. *ante*.

<sup>15</sup> But if the security produce advantage to the person for whom he became bound, he has his recourse against either: this observation is confirmed by a similar remark of *Palacios*, with the addition, that if the person on whose behalf the order or request was made, was present, and did not contradict it, he is also liable to the surety. Vide L. 13. tit. 12. P. 5.

<sup>16</sup> The omission to make the exception, a peremptory one is meant by the law cited, must be wilful: ignorance will excuse him. Vide L. 15. tit. 12. P. 5. quoted. By the civil law, the mismanagement of the cause by surety, seems only to affect his right of

or relate only to the person of the surety,<sup>17</sup> L. 15. tit. 12. P. 5. [L. 15. tit. 12. P. 5.]

recovering back the costs of suit paid by him on account of his principal. If, says Wood, *Civ. Law*, p. 227. ch. 3. book 3., the surety being prosecuted by the creditor, makes an ill defence, and is cast for want of management of his case, it ought to be judged according to the circumstances of the matter, whether he shall recover his costs of suit of the principal debtor.

<sup>17</sup> Or belonging only to the person of the debtor, as noticed by *Palacios*. See L. 15. tit. 12. P. 5., *al fin*.

## TITLE XIX.

## OF CRIMES AND PUNISHMENTS IN GENERAL.

CAP. 1. HAVING treated of the right to the thing, and of [ 218 ] the different obligations arising from a lawful act, we will now treat of that which produces an unlawful act, which is called crime.

§ 1. Crime (*delito*)<sup>1</sup> is every bad act which is done or committed wilfully by one to the injury (*daño*) or discredit (*deshonra*) of another, *Prol. Part. 7.* [*Prol. P. 7.*] If this bad act is done with an injurious or malicious (*doñada*) intention, that is with *dolo*, it [ 219 ] is a real or proper crime (*delito verdadero*), which our laws comprehend under the general name of offence (*malfetria*); but if this act proceeds only from an omission, although culpable, it is called *quasi* crime. Hence it is, that only the person who is of sufficient age to act with this malice, can be a delinquent, and punished as such: this age our legislators have determined to be ten years and a half, and upwards (*de diez años y media arriba*),<sup>2</sup> *L. 9. tit. 1. P. 7.* [*L. 9. tit. 1. P. 7.*]

The madman, or person of non-sane mind, is also not capable of committing a crime, *L. 9. tit. 1. P. 7.* [*L. 9. tit. 1. P. 7.*]

Cap. 2. The difference between public and private crimes does not arise among us merely from the diversity of persons against whom they are committed, but principally from the circumstance whether the judge may proceed against the delinquent *de oficio proprio*, or by accusation alone; and, in this sense, are reckoned among the first kind, robbery (*robo*) and theft (*hurto*).<sup>3</sup> The division of crimes into

<sup>1</sup> *Delito*, says *Palacios*, is transgression or contravention of law, which deserves punishment by human laws.

<sup>2</sup> *Palacios* observes, and he is supported by *L. 9. tit. 1. P. 7.*, that even from or after that age, they are not to be punished as persons of greater age. Seventeen years seems the age at which full punishment for an offence may be inflicted. See also *L. 10. tit. 7., L. 17. tit. 14., and L. 8. tit. 31. P. 7., and L. 1. 2. and 3. tit. 14. lib. 12. Nov. Rec.* It is said that a person under 14, cannot be punished for perjury, although it would seem that such an one might, if *doli capax*. See *L. 7. tit. 11. P. 3., and Greg. Lop. Gl. 3. thereon.* It may be here observed, that by the laws of England, an infant within the age of seven years cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for, *ex presumptione juris*, such an infant cannot have discretion, and against this presumption no averment shall be admitted; yet it appears there is a precedent in the *Register*, fol. 309. b of a pardon granted to an infant within the age of seven years, who was indicted for homicide, the jury having found that he did the fact before he was seven years old. *Russell on Crimes*, 1st vol. p. 3. and note (m). See also 4th *Blac. Com.* p. 23.

<sup>3</sup> *Palacios* says, public crime is that which is committed principally against the commonwealth, and of which, under this consideration, our laws permit any one of the public to be the accuser. Every crime, therefore, which is committed in offence of God, of the sovereign, state, or the country (*patria*), will be a public one. A private crime is that

ordinary and extraordinary does not take place (*no es el caso*) among us;<sup>4</sup> because our laws have been so prolix in establishing certain punishments for every kind of crime, that it is only left to the discretion of the judge to moderate or increase them when their circumstances vary.

§ 1. Among public crimes, that of *læse majestatis*, or treason, as being the most atrocious, holds the first place. Numerous are the modes whereby crime is committed against the supreme majesty of the sovereign, and which, with reason, draw down upon the offenders the disgraceful name of traitors. The crime of treason is that which is committed against the person of the king, or against the commonwealth, L. 3. tit. 2. P. 7. [L. 3. tit. 2. P. 7.] As this crime proceeds from the little veneration or respect that is shown to the sovereign, he who in deed or act is wanting in this, becomes a delinquent. Therefore, not only is the person guilty of treason who offends against the king (*majestad*) by any of the fourteen acts expressed by L. 1. tit. 2. P. 7., [L. 1. tit. 2. P. 7.] but also he who shall speak ill of the king, his family and state, L. 6. tit. 2. P. 7. and L. 1. tit. 18. lib. 1. Rec.<sup>5</sup> [L. 6. tit. 2. P. 7. and L. 7. tit. 8. lib. 1. Nov. Rec.]; for which [220] case the decree of 18th September, 1766, ought to be kept in mind, which prohibits all murmuring and invective (*declamacion*) against the government. So heinous is this crime, that it is not included among the pardons (*perdones*) which the king grants, L. 1. tit. 25. lib. 8. Rec. [L. 1. tit. 42. lib. 12. Nov. Rec.]

In this class of crimes may be included that committed by defrauders of the royal rents, L. 1. tit. 8. lib. 9. Rec. [L. 7. tit. 15. lib. 12. Nov. Rec.,] and smugglers (*contrabandistas*) defrauding the rights of the royal revenue (*real hacienda*), and against whom various decrees have been promulgated. See that of 19th November, 1748.<sup>6</sup>

§ 2. In the second place, forging is a crime against the public, of which utterers of false money (*monederos falsos*) who clip or counterfeit the current coin, are guilty, L. 9. tit. 7. P. 7. [L. 9. tit. 7. P. 7.] 2d, The counterfeiters of royal seals, L. 4. tit. 7. P. 7. [L. 4. tit. 7. P. 7.] 3d, The escribanos who are wanting in any thing which regards the public faith, to which they are bound by their office, Ll. 1. and

which is committed principally (perhaps directly would be a more appropriate term than principally, although *principalmente* is in both instances made use of) against any private individuals, and of which the party interested or injured, only is permitted to be the accuser. See also Wood's *Civ. Law*, book 3. ch. 7. p. 250., who makes this distinction between public and private offences. When the offence is of a public nature, it is properly called a *crime*; when it is private, it may be more properly called *delictum* or *maleficium*, a trespass or an offence. The learned Professor first mentioned further observes, that whatever is not conformable to the above definition and principles, in the classification and list which the text gives in this title of public and private crimes, ought to be dismissed from the understanding.

<sup>4</sup> *Palacios* is, however, of a different opinion.

<sup>5</sup> This law is not inserted in the *Nov. Rec.*

<sup>6</sup> *Palacios* says, that since that year forty royal orders have been issued with respect to smuggling. He refers to the royal *cedula* of 8th June, 1805, and the instruction inserted in it, which is that which governed in 1806.

6. tit. 7. P. 7. [Ll. 1. and 6. tit. 7. P. 7.] 4th, The prevaricating advocate who cites false laws (*leyes falsas*) in the suits which he carries on, L. 1. tit. 7. P. 7. [L. 1. tit. 7. P. 7.] 5th, The keeper of the archives of the council, or public archives, who shows the archives contrary to his orders, L. 1. tit. 7. P. 7. [L. 1. tit. 7. P. 7.] 6th, The judge who decides contrary to law, L. 2<sup>7</sup> tit. 7. P. 7. 7th, The perjured person who swears falsely, L. 1. tit. 7. P. 7. 8th, He who suborns the judge or witness, L. 1. tit. 7. P. 7. 9th, He who pretends to be a knight (*caballero*) or priest, without being so, L. 2. tit. 7. P. 7. [L. 2. tit. 7. P. 7.] 10th, Those who make use of false measures or weights in trade, L. 7. tit. 7. P. 7. 11th, Public surveyors who knowingly or wilfully (*á sabiendas*) measure falsely, L. 8. tit. 7. P. 7. [L. 8. tit. 7. P. 7.]

§ 3. In the third place, those are public crimes which cause scandal (*escandalo*) against which the judge may proceed *de oficio*, according to L. 4. tit. 19. lib. 8. Rec.<sup>8</sup> and L. 5. tit. 19. lib. 8. Rec. [L. 1. tit. 26. lib. 12. Nov. Rec.] In this class are comprehended, 1st, Those who live in concubinage (*amancebados*), Ll. 1, 2, 3 and 4.<sup>9</sup> tit. 19. lib. 8. Rec. [Ll. 3, 4 and 5. tit. 26. lib. 12. Nov. Rec.] 2d, Heretics whom the *Prol.* of tit. 26. P. 7. [Prol. tit. 26. P. 7.] defines in this way:—a description of mad people who labor to pervert (*de escatimar*) the words of our Lord Jesus Christ, and give them another meaning contrary to that which the holy fathers gave, and which the church of Rome believes and orders to be observed. To this class belong the Jews and Moors, whom we are bound to discover or make known (*descubrir*), if we know they are among us without the royal permission, according to L. 9. tit. 25. P. 7.;<sup>10</sup> [L. 9. tit. 25. P. 7.;] and, therefore, all the other laws of the 24. and 25. tit. P. 7., which treat of the mode in which they should live in Spain, are obsolete. 3d, Sodomites who commit an abominable sin, having connection with one another contrary to nature or [ 221 ] natural custom, *Prol.* tit. 21. P. 7. [Prol. tit. 21. P. 7.] 4th, Pimps, or panders, who entrap women, inducing them by cunning arts, or procuring them to prostitute their bodies, L. 1. tit. 22. P. 7., [L. 1. tit. 22. P. 7.] which specifies five kinds of pimping. 5th, Persons practising witchcraft (*hechiceros*), augurers (*agoreros*), soothsayers (*adivinos*), and other buffoons (*truanes*), who, with their impositions, lead the people into a thousand errors, pretending to possess the power of God in knowing things which are to happen, L. 1. tit. 23. P. 7. [L. 1. tit. 23. P. 7. tit. 28. P. 7.] 6th, Blasphemers against

<sup>7</sup> L. 1. tit. 7. P. 7. is meant.

<sup>8</sup> This law is not inserted in the *Nov. Rec.* The quotations in the text appear to be erroneous. Ll. 4. and 5. tit. 13. lib. 8. Rec. are the laws cited in the edition of the text by *Palacios*.

<sup>9</sup> Not inserted in the *Nov. Rec.*

<sup>10</sup> This law applies to ambassadors from the Moors coming or being sent to reside in Spain, and does not touch upon the matter here set forth in the text. The 25th title of the 7th *Partida* contains enactments relative to Moors; and those of the 24th title of the same *Partida* refer to Jews.



God, the most holy Mary, and her saints, tit. 28. P. 7. By blasphemy is understood all that is said in contempt, and with the intention of being revenged by word,<sup>11</sup> Prol. tit. 28. P. 7. [Prol. tit. 28. P. 7.] 7th, Bigamists, or those who are married at one time to two women, L. 8. tit. 20. lib. 5. Rec.<sup>12</sup> [L. 9. tit. 28. lib. 12. Nov. Rec.] 8th, Sacrilegious persons, who are of two sorts, 1st, Those who raise their angry hands against the clergy, or religious persons. 2d, Those who steal or rob any sacred thing in a church, or out of it, Ll. 1. and 2. tit. 18. P. 1. [Ll. 1. and 2. tit. 18. P. 1.] 9th, Persons guilty of simony, who purchase or sell a spiritual thing, L. 1. tit. 17. P. 1. [L. 1. tit. 17. P. 5.] 10th, Persons guilty of incest, tit. 28.<sup>13</sup> P. 7. 11th, Ravishers of a religious woman, a widow, virgin or married young woman; against whom an accusation may be preferred by any of the people, if the relations of such women should not do it, L. 2.<sup>14</sup> tit. 20. P. 7. [L. 2. tit. 20. P. 7.]

§ 4. In the fourth place, those commit a public crime who make use of force and violence to take any thing, real or personal, the kinds of which are expressed in tit. 10. P. 7. [tit. 10. P. 7.] By the laws of this title, it appears those are guilty of using force (*forzadores*), 1st, Who with arms, and in a mutinous manner (*amotinadamente*), possess themselves of any thing, L. 2. tit. 10. P. 7. [L. 2. tit. 10. P. 7.] 2d, Those who rob at the time of any fire, or prevent its being extinguished, L. 3. tit. 10. P. 7. [L. 3. tit. 10. P. 7.] 3d, Judges who do not admit an appeal from their sentence, L. 4. tit. 10. P. 7. [L. 4. tit. 10. P. 7.] 4th, Royal tax gatherers or collectors of rents or revenue (*recaudadores*), who collect more than the king orders, L. 5. tit. 10. P. 7. [L. 5. tit. 10. P. 7.] 5th, Powerful or wealthy persons (*poderosos*), who, through the dread of their power impede the due or right administration of justice, L. 6. tit. 10. P. 7. [L. 6. tit. 10. P. 7.] 6th, Persons guilty of arson (*incendiaríos*), L. 9. tit. 10. P. 7. [L. 9. tit. 10. P. 7.] 7th, Those who enter on the possession of the inheritance of another, without the order of the judge, L. 10. tit. 10. P. 7. [L. 10. tit. 10. P. 7.] 8th, Those who refuse to give up the thing which they hold under rent, deposit, &c., L. 12. tit. 10. P. 7. [L. 12. tit. 10. P. 7.] 9th, He who pledged (*empeño*) his property, if he takes it away from his creditor by force before he has paid the debt,<sup>15</sup> L. 13. tit. 10. [222] P. 7. [L. 10. tit. 13. P. 7.] 10th, Those who without the authority of the judge, arrest their debtors or take any thing from them,<sup>16</sup> Ll. 14. and 15. tit. 10. P. 7. [Ll. 14. and 15. tit. 10. P. 7.]

<sup>11</sup> Another and more appropriate definition of blasphemy is given by *Palacios*, who says it is a bad word, or injurious expression against God or his saints.

<sup>12</sup> See also Ll. 6. 7. and 8. tit. 28. lib. 12. Nov. Rec.

<sup>13</sup> A typographical error: read tit. 18. P. 7.

<sup>14</sup> See also L. 1. *ibid.*

<sup>15</sup> This applies strictly to pledge or pawn, where possession of the property pledged has been delivered by the debtor to the creditor. See L. 13. tit. 10. P. 7. cited; and *Greg. Lep.* Gl. 1. thereon.

<sup>16</sup> In satisfaction or security of their debt.

11th, Those who break prison, and their aiders,<sup>17</sup> L. 13. tit. 29. P. 7. [L. 13. tit. 29. P. 7.] 12th, The violators or seducers (*desfloradores*) of virgins, and the ravishers of women, upon which the laws of the 19th Title, Part. 7. [Tit. 19. P. 7.] treat.

§ 5. Among crimes committed by force, we must also reckon homicide, challenges (*desafios*), adulteries, and injuries from which blood-shedding follows,<sup>18</sup> L. 4. tit. 10. lib. 8. Rec. [L. 3. tit. 25. lib. 12. Nov. Rec.]

Homicide is, the killing of man (*matamiento de home*), L. 1. tit. 8. P. 7. [L. 1. tit. 8. P. 7.] It is casual or excusable (*causal*), wilful or felonious (*determinado*), and justifiable (*justo*). The casual is that which happens without any previous (*prevénida*) intention, and ought not to be punished, Ll. 4. and 5. tit. 8. P. 7. [Ll. 4. and 5. tit. 8. P. 7.] The wilful is that which is committed intentionally: of this kind of homicide not only is the person guilty who intentionally goes to kill or kills another, but also the person who furnishes or concert (*pone*) the means by which he dies. Thus, therefore, are to be punished as guilty of homicide, 1st, Physicians, surgeons, &c., who, ignorant of their arts or professions, cause death by attempting to practise them,<sup>19</sup> L. 6. tit. 8. P. 7. [L. 6. tit. 8. P. 7.] 2d, Mothers who take any thing to destroy their young (*el feto*),<sup>20</sup> L. 8. tit. 8. P. 7. [L. 8. tit. 8. P. 7.] 3d, The apothecary or spice dealer, who sells noxious herbs, knowing they serve to cause death to any one, L. 7. tit. 8. P. 7. [L. 7. tit. 8. P. 7.] 4th, Those who chastise cruelly their child, scholar, or servants,<sup>21</sup> L. 9. tit. 8. P. 7. [L. 9. tit. 8. P. 7.] 5th, He who lends arms or assistance to kill another,<sup>22</sup> L. 10. tit. 8. P. 7. [L. 10. tit. 8. P. 7.] 6th, The judge who maliciously gives sentence of death against any one,<sup>23</sup> L. 11. tit. 8. P. 7. [L. 11. tit. 8. P. 7.] 7th,

<sup>17</sup> L. 13. tit. 29. P. 7., cited in the text does not particularly add their aiders.

<sup>18</sup> These crimes considered in themselves, and without other circumstances, ought not to be reckoned, says *Palacios*, among crimes of or accompanied by force; nor do the laws reckon them such: and he refers to tit. 10. P. 7., where crimes of force are treated of.

<sup>19</sup> *Palacios* says, it is one thing to kill through ignorance, and another through malice. That, in the first case, such persons are punishable with five years' transportation to some island, according to L. 6. tit. 8. P. 7. cited in the text, though, as he observes, *Greg. Lopez*. Gl. 3. L. 9. tit. 15. P. 7. hath said, that this punishment of banishment to an island was not in use even in his time; but, in the second case, they are punishable with death.

<sup>20</sup> If the woman, in such case, hath quickened, she is punishable with death: if she hath not quickened, she is punishable with five years' transportation to an island. See L. 8. tit. 8. P. 7. cited. *Palacios* here observes, that it is necessary in the case mentioned in the text, death should have been the effect thereof.

<sup>21</sup> Or slave, the law cited adds. If death be the result, and it was unintentional, the punishment is five years' transportation to an island; and if the chastisement was with the intention to kill, the punishment is death. This is noticed by *Palacios*, and is stated in L. 9. tit. 8. P. 7. cited in the text.

<sup>22</sup> As also one who should wilfully lend or give arms to a madman, drunkard, person in a violent rage, &c. to kill himself, if death should in either case ensue.

<sup>23</sup> Whether it be of natural or civil death (banishment), or of loss of limb, according to L. 11. tit. 8. P. 7. cited. It may be useful to notice a most material difference in the wording of this law in the edition of the *Partidas*, with the Gl. of *Greg. Lop.* published at Valencia by Benito Montfort, in 1767, and the edition of the *Partidas* published in Madrid, 1807, by the Royal Academy of History. In the first the law runs thus:—"*Pena de omicida merece el juez, que á sabiendas da falsa sentencia,*" &c. In the second, the words *á sabiendas* are entirely omitted.

He who castrates another, if death ensue,<sup>24</sup> L. 13. tit. 8. P. 7. [L. 13. tit. 8. P. 7.]

Justifiable homicide is, when any one kills another with just reason, either by defending himself, or revenging the injury (*agravio*) done to his person or property at the time (*en el mismo acto*), L. 2. and 3. tit. 8. P. 7. [L. 2. and 3. tit. 8. P. 7.]

§ 6. Those who challenge to fight a duel, the person challenged, the seconds, those who knowingly carry the challenge, those who are present at a duel, and do not prevent it themselves, or give information of it to justice, commit the grave crime of duelling (*desufo*),<sup>25</sup> which is to challenge one another to fight (*emplazarse para reñir*), *Auto* 1. tit. 8. lib. 8. Rec. [L. 2. tit. 20. lib. 12. Nov. Rec.], by which the ancient laws respecting summoning to combat (*riepto*) were annulled and prohibited under heavy penalties.

[223] § 7. Adultery is the crime which a man commits knowingly (*á sabiendas*), by having intercourse with a married woman, or one betrothed (*desposada*) to another man, L. 1. tit. 17. P. 7. [L. 1. tit. 17. P. 7.] The husband, the father, the adulteress, her brother, and paternal or maternal uncles, are the legitimate accusers of the adulterer, while the marriage is not dissolved by the sentence of the church; and after it is dissolved, within sixty useful or lawful (*utiles*) days, L. 2. tit. 17. P. 7. [L. 2. tit. 17. P. 7.] But if the scandal were great, any of the town people may accuse in the first case; and in the second for four months after,<sup>26</sup> reckoned also usefully (*utilmente*); and in case of the husband dying, six months, reckoned from the day on which the adultery was committed, are allowed to prefer the accusation, L. 3. tit. 17. P. 7. [L. 3. tit. 17. P. 7.] While the married persons are united, the accusation may be preferred before the competent judge until or within five months from the day on which the adultery happened; and if force was used, until thirty years,<sup>27</sup>

<sup>24</sup> And even though death should not ensue, observes *Palacios*, referring to L. 13. tit. 8. P. 7. cited, by which he is supported.

<sup>25</sup> *Palacios* observes, that it is not to be inferred from this that all are guilty of the same crime, L. 2. tit. 20. lib. 12. Nov. Rec. says, that as well they who send, who receive, and who carry the challenge with a knowledge thereof, or act as seconds, shall unpardonably lose, for such conduct, all the offices, rents, and honors, which they may hold from the king, and are incompetent to hold them in future. If the parties go out to the place appointed, although no duel takes place, the principals, it would seem, are punishable with death and confiscation of all their property. All those who witness the duel, and being able, do not prevent it, or do not go to give information to justice, are punishable with six months' imprisonment and the loss of the third part of their property. In this crime, prescription does not take place. There is a distinction made by L. 1. tit. 20. lib. 12. Nov. between the challenger and the challenged; but this does not appear by L. 2. *ibid.*, which is a much later enactment than L. 1. See both, and L. 3. *ibid.*

<sup>26</sup> From the expiration of the sixty days allowed the husband, &c. See L. 3. tit. 17. P. 7. cited.

<sup>27</sup> *Palacios*, after pointing out various errors into which the text has fallen, with reference to what is stated in the laws of the 17th title of the 7th *Partida*, which it has cited, says, that by L. 2. tit. 19. lib. 8. Rec., which is L. 4. tit. 26. lib. 12. Nov. Rec., the husband alone can prefer the accusation of adultery, and that he cannot accuse the adulteress, without accusing the adulterer, nor *vice versâ*, while they are both living, referring for the last position to L. 2. tit. 20. lib. 8. Rec., which is L. 3. tit. 28. lib. 12. Nov.

L. 4. tit. 17. P. 7. [L. 4. tit. 17. P. 7.] In regard to the person accused of this crime, we say that he may avoid the prosecution (*el juicio*) with exceptions. 1st, If the accusation was preferred after the above mentioned times, L. 7. tit. 17. P. 7. [L. 7. tit. 17. P. 7.] 2d, If at the first citation the adulteress should prove she committed the offence with the consent of her husband,<sup>28</sup> L. 7. tit. 17. P. 7. [L. 7. tit. 17. P. 7.] 3d, If the accuser, be he who he might, should abandon the cause when once begun, and afterwards should wish to continue it, L. 8. tit. 17. P. 7. [L. 8. tit. 17. P. 7.] 4th, If the husband should say before the judge that he does not wish to accuse his wife, and afterwards endeavor the contrary, L. 8. tit. 17. P. 7. [L. 8. tit. 17. P. 7.] 5th, If, knowing the adultery, he should admit her into his house, and should live with her, L. 8. tit. 17. P. 7. [L. 8. tit. 17. P. 7.] 6th, If the husband accuser were of bad character and habits,<sup>29</sup> L. 9. tit. 17. P. 7. [L. 9. tit. 17. P. 7.] 7th, If they should accuse her of adultery, from which she was previously acquitted for want of proofs, but not if it were for a second offence, L. 9. tit. 17. P. 7. [L. 9. tit. 17. P. 7.] 8th, If the husband accuses the widow with whom he married, of adultery committed in the time of the first marriage; because having married her, the accusation is presumed renounced, L. 9. tit. 17. P. 7. [L. 9. tit. 17. P. 7.]

§ 8. In the fifth place robbery and theft are public crimes. Robbery (*robo*) is a sort of offence (*malfetria*) which falls between theft and force or violence, *Proh.* tit. 13. P. 7. [*Proh.* tit. 13. P. 7.,] that is which partakes of both,<sup>30</sup> and therefore when L. 1. tit. 13. P. 7. [L. 1. tit. 13. P. 7.] defines rapine (*rapina*) saying that it is robbery (*robo*) which men commit on the property of others, that is moveable or personal, it means to say, that it is a theft committed with violence, in [ 224 ] contradiction to simple theft which is not accompanied with violence. There are three sorts of robbery, 1st, That committed by soldiers in time of war which we call pillage (*saqueo*). 2d, That which is committed in a desert place, or in a town without lawful reason for doing it, and under this sort are comprehended highwaymen (*salteadores de caminos*) or footpads and robbers in towns, against whom the judges ought to proceed *de oficio* whenever they know in what town

Rec. The law referred to by the learned Professor in support of his first position, does not seem to bear him out in its unqualified statement. This L. 4. tit. 26. lib. 12. Nov. Rec. provides for the mode of proceeding by Justices, against the concubines (*mancebas*), of the clergy, and against husbands who may consent to their wives being such. This law, after declaring that no married woman, but only a *feme sole*, can be said to be the concubine of a clergyman, friar, &c. adds, "y que la tal muger casada no pueda ser demandada en juicio ni fuera de el, salvo si su marido la quisiere acusar," which is all it states upon the subject. But *Ant. Gom.* in his *var. res.* tom. 3. cap. 1. n. 89., lays down the position in the same manner as the learned Professor has here done.

<sup>28</sup> That is to say, as *Palacios* properly observes, if this exception should be opposed before contestation of suit, and should be proved. See L. 7. tit. 17. P. 7., cited.

<sup>29</sup> And the wife should allege, observes *Palacios*, this exception, before contesting the suit, and should prove it. See L. 9. tit. 7. P. 7. cited.

<sup>30</sup> In which both theft and violence intervene, also explains *Greg. Lop.* Gl. 1. on *proh.* tit. 13. P. 7.

there are any. The third sort of robbery is that which those commit who assist in the burning of any house,<sup>31</sup> in the wreck or destruction of any ship under the pretence of succoring and affording assistance. These are considered as persons guilty of violence (*forzadores*), by L. 3. tit. 10. P. 7.<sup>32</sup> [L. 3. tit. 10. P. 7.]

Theft is an offence which men commit who take secretly (*encubiertamente*) any movable<sup>33</sup> thing belonging to another without the will of the owner, with the intention of gaining the property (*señorio*) or possession, or the use of it, L. 1. tit. 14. P. 7. [L. 1. tit. 14. P. 7.] Hence it is, 1st, That every thing stolen must be movable, and taken against the will of the owner. 2d. That to constitute theft, it must be accompanied with a malicious intention. 3d, That it be always committed on the property of another. 4th, That it be done with the intention of acquiring the property, possession, or use of the thing which is stolen. From the first principle it follows, 1st, That if a person should take the property of another with the will or consent of the owner, or supposing he has it<sup>34</sup> such person does not commit theft, L. 1. tit. 14. P. 7. [L. 1. tit. 14. P. 7.] 2d, That gamblers (*tahures*), or jugglers (*truanes*), who keep a gaming house, cannot complain of the theft<sup>35</sup> committed against them by the persons collected there, it being presumed that they have given their consent to it by admitting bad people into their houses, L. 6. tit. 14. P. 7. [L. 6. tit. 14. P. 7.] 3d, That the taking of castles, cities, &c., is not properly theft, but force and violence, Ll. 2. and 10. tit. 10. P. 7. [Ll. 2. and 10. tit. 10. P. 7.]

From the second principle it is inferred, 1st, That madmen, persons insane, and minors of ten years and a half cannot commit theft, L. 17. tit. 14. P. 7. [L. 17. tit. 14. P. 7.] 2d, That persons under twenty years ought to be punished with lighter punishment than those above that age, L. 7. tit. 11. lib. 8. Rec.<sup>36</sup> [L. 1. tit. 14. lib. 12. Nov. Rec.] 3d, That what is stolen to support hunger, or in a small

<sup>31</sup> This, by the laws of England, is called arson.

<sup>32</sup> This law does not refer to the destroying or plundering vessels, although it treats of arson. L. 1. tit. 10. P. 7., does however apply to robbing or plundering vessels, as does L. 1. tit. 13. P. 7. See *Greg. Lop.* Gl. 3., on this last law; and see *Russell on Crimes*, 2d vol. ch. 13. p. 1208, as to plundering vessels in distress or wrecked; and *ibid.*, ch. 44. p. 1731, as to destroying and damaging vessels and articles belonging to them, under the laws of England.

<sup>33</sup> L. 1. tit. 14. P. 7., cited, says theft cannot be committed of real property.

<sup>34</sup> But with ground or foundation for so supposing, observes *Palacios*.

<sup>35</sup> Or indeed other wrong or injury short of homicide or mutilation of limb. See L. 6. tit. 14. P. 7., cited, and *Greg. Lop.* Gl. 3. thereon.

<sup>36</sup> *Palacios* says, that by this law, thieves and vagabonds under twenty years of age; and women who are vagabonds and thieves; and slaves, to whomsoever they may belong, may not be sentenced to the galleys, but are to be punished according to the laws of the kingdom. But that by L. 9. tit. 11. lib. 8.; (L. 2. tit. 14. lib. 12. Nov. Rec.); posterior to L. 7. tit. 10. lib. 8. Rec.; or L. 1. tit. 14. lib. 12. Nov. Rec., cited in the text, the punishment for thieves is increased; and it is directed, that persons of seventeen years of age may be punished with or condemned to the galleys.

quantity by servants, ought not to be punished as theft,<sup>37</sup> L. [225] 17. tit. 14. P. 7. [L. 17. tit. 14. P. 7.]

From the third principle it is deduced, 1st, That he who takes any thing from an inheritance not yet entered upon, or appropriated (*heredadyacente*),<sup>38</sup> does not commit theft, but the crime *expilatoris hæreditatis*, which is equivalent to an offence a person commits in plundering (*mesar*) the estate of another, L. 21. tit. 14. P. 7. [L. 21. tit. 14. P. 7.] 2d, That children cannot be prosecuted, as for theft, for things which they take belonging to their parents, although their advisers, and aiders or abettors, are guilty of theft, L. 4. tit. 14. P. 7. [L. 4. tit. 14. P. 7.] 3d, That the same is understood with respect to what the wife may take from her husband,<sup>39</sup> L. 4. tit. 14. P. 7. [L. 4. tit. 14. P. 7.] 4th, That the guardians cannot be accused as thieves for what they may take<sup>40</sup>, from the wards or minors under their power or guardianship, because they are as fathers and masters of them; although they shall not remain without their just punishment, L. 5. tit. 14. P. 7. [L. 5. tit. 14. P. 7.]

From the fourth principle we discover, 1st, That if any thing is carried off, or taken away with another design than that of robbery or theft, as in the case of those who run away with, or carry off (*roban*) women, theft is not committed, L. 1. tit. 20. P. 7. [L. 1. tit. 20. P. 7.] 2d, That persons are guilty of this crime who make use of the thing lent to them (*en comodato*) longer than was agreed upon,<sup>41</sup> L. 3. tit. 14. P. 7. [L. 3. tit. 14. P. 7.] 3d, That those who, without the license of the king, coin or manufacture money, although it may be of the same value as the public or legalised coin, commit theft, by reason of the gain which they thereby make for themselves, and also those who counterfeit any work of gold, silver, &c., by the admixture of another metal of base value, L. 15. tit. 14. P. 7. [L. 15. tit. 14. P. 7.] 4th, Those commit theft who take away the timber, pillars, or other

<sup>37</sup> L. 17. tit. 14. P. 7. says, that what is great or petty larceny, is left to the discretion of the judge, to be regulated by the consideration of the thing stolen, and the person by and from whom stolen? See the law.

<sup>38</sup> If a person, observes *Palacios*, referring to L. 11. tit. 14. P. 7., cited, should take away any thing from an inheritance not accepted, or *herencia yacente* (*hereditas jacens*), as it is wont to be called, he cannot be prosecuted for the recovery of the thing, and for theft, but he may be compelled to return the thing with the fruits, and besides, the judge may inflict on him a corresponding punishment for the offence. This punishment, according to the law cited, which is to be imposed at the discretion of the judge, is either five years' banishment, or transportation to any island, or condemnation to hard labor for a certain time, according to the rank of the offender.

<sup>39</sup> And the same rule applies to slaves stealing from their owners. See L. 4. tit. 14. P. 7., cited.

<sup>40</sup> *Take* is a more appropriate word than *steal*, which is made use of in the text; and L. 5. tit. 14. P. 7., authorises the adoption of the first. The punishment for such spoliation on the part of the guardian is, by the law cited, forfeiture or payment to the ward of double the amount of the property so taken.

<sup>41</sup> This must be taken with some limitation or qualification: if the borrower thought the lender would not be angry with him on account of such extended use of the thing, or if, in point of fact, the lender should not be angry, although the borrower might have thought otherwise, it will not amount to theft. The *animus quo* the thing was kept, would, perhaps, be the proper rule to go by in such a case. See L. 3. tit. 14. P. 7., cited.

materials of building or work belonging to another to appropriate them to their own use, L. 16. tit. 14. P. 7. [L. 16. tit. 14. P. 7.] 5th, Persons also commit theft<sup>43</sup> who change the landmarks or boundaries of an estate or town (*termino*), L. 30. tit. 14. P. 7. [L. 30. tit. 14. P. 7.] 6th, That there is theft of the thing itself, of the possession, and of the use thereof. Theft of the thing is committed by taking any thing movable, whether it be animate or inanimate, Ll. 19. and 22. tit. 14. P. 7.<sup>43</sup> [Ll. 19. and 22. tit. 14. P. 7.] The debtor who takes away the thing which he had given in a pawn (*en prenda*) to his creditor commits theft of the possession, L. 9. tit. 14. P. 7. [L. 9. tit. 14. P. 7.] He who uses a thing for other purposes than those for which it was granted or lent commits theft of the use, L. 3. tit. 14. P. 7. [L. 3. tit. 14. P. 7.] Besides the distinction of theft into manifest and occult, of which L. 2. tit. 17. P. 4. [L. 2. tit. 17. P. 4.] speaks, we are acquainted also with that of a simple and qualified (*calificado*) theft; the first is made without noise or violence (*estrepito*), and the second with arms, fracture or breaking<sup>44</sup> (*quebrantamiento*), &c. Simple theft is distinguished into petty and great, according to the quantity or value (*cantidad*),<sup>45</sup> of what is stolen; and therefore it is left to the discretion of the judge to consider of the quality of the thief, of the thing stolen, &c., in order to impose the punishment. The action of theft is instituted (*se instaure*) by the owner of the thing or his heir, against the thief and his accomplices, L. 4. tit. 14. P. 7.;<sup>46</sup> [L. 4. tit. 14. P. 7.] and if there are many, against each of them in solidum, L. 20. tit. 14. P. 7. [L. 20. tit. 14. P. 7.] See Ll. 10, 11, and 12. tit. 14. P. 7. [Ll. 10, 11, and 12. tit. 14. P. 7.]

Cap. 3. Private crimes are reduced to damage or trespass (*daño*), or to injury by deed, word, or writing (*injuria*) done to an individual. The damage or trespass (*daño*) is either caused by men, or by beasts.<sup>47</sup> The first, the Romans called *damnum injuria datum*, and the second *pauperies*.<sup>48</sup>

<sup>43</sup> *Palacios* observes, that it cannot, properly speaking, be said that they commit theft in this case, and quoting the words of L. 30. tit. 14. P. 7., that although a man cannot be properly said to commit theft in respect of property which is real, yet he commits an offence which is similar to theft.

<sup>44</sup> The first of these laws cited, applies to stealers of cattle and sheep, &c., *abigri*; and the second to man-stealing, including slaves, &c.; this last offence is called *Plagium*. See both laws, 19 and 22. tit. 14. P. 7., cited.

<sup>45</sup> *Palacios* says, simple theft is that which is attended with no circumstance of aggravation; and qualified theft is that which is so attended; and he adds, referring to L. 18. tit. 14. P. 7., among other things, it will be there found that a theft of any thing sacred committed in a church, is qualified, without its being necessary to make it so, that it should be committed with any noise or violence (*estrepito*).

<sup>46</sup> *Palacios* observes, that qualified theft will be petty or grand according to the quantity or value of what is stolen.

<sup>47</sup> The 17th tit. is here erroneously referred to in the text, as also with respect to the four following quotations.

<sup>48</sup> And, therefore, says *Palacios*, the first will be reckoned among crimes, but not the second; for he adds, in the words of *Justinian*, § *init. Inst. si quod. paup. fec. dic.* " *ne enim potest animal injuriam fecisse dici, quod sensu caret.*"

*Palacios* says, these two offences (*daño* and *injuria*), were, among the Romans (from

§ 1. Damage or trespass (*daño*), is the deterioration, injury, or destruction which a man suffers with respect to his person or his property by the fault (*culpa*) of another, L. 1. tit. 15. P. 7. [L. 1. tit. 15. P. 7.] There are three kinds of *daño*; the first, that, by reason of which a person's property or thing is deteriorated by being mixed with the property of another;<sup>40</sup> the second when it loses part of its value; and the third when it is destroyed or totally lost, L. 1. tit. 15. P. 7. [L. 1. tit. 15. P. 7.]

Upon this, two principles are founded: 1st, That all damage caused to the thing (*en la cosa*) ought to be made good to the owner of it by him who caused the damage. 2d, That for this purpose it is enough that the most trifling fault (*levissima culpa*) intervenes.

From the first principle it is deduced, 1st, That the owner of the thing, or his heir, may institute this action, L. 2. tit. 15. P. 7.; [L. 2. tit. 15. P. 7.] and in the absence of them, the person enjoying the usufruct (*usufructuario*), the feudatory (*feudatario*), the depositary (*depositario*), and the attorney (*apoderado*),<sup>41</sup> &c., L. 2. tit. 15. P. 7. [L. 2. tit. 15. P. 7.] 2d, The mortgagee, if damage be done to him in respect of the thing which he has in mortgage or pawn, the debtor not having wherewithal to pay him, L. 2. tit. 15. P. 7. [L. 2. tit. 15. P. 7.] 4th, That the heirs of him who caused the damage<sup>42</sup> ought to make it good, if the suit were commenced before the death of his ancestor or devisor,<sup>43</sup> L. 3. tit. 15. P. 7. [L. 3. tit. 15. P. 7.]

From the second principle it follows: 1st, That the damage which a judge causes to a vanquished party by his sentence,<sup>44</sup> ought not to be made good by him, L. 4. tit. 15. P. 7. [L. 4. tit. 15. P. 7.] 2d, Nor that which an agent or servant (*un subdito*) causes by [ 227 ] order of his superior, unless it should be an unlawful thing<sup>45</sup> which he ought not to fulfil or execute, L. 5. tit. 15. P. 7. [L. 5. tit. 15. P. 7.] 3d, That those who commit an act in a place where people assemble, from which damage may arise, are responsible for the injury or damage which may result therefrom to persons who assemble there, as the person who rides fast through the streets (*que corre á caballo por las calles*); the bricklayer who does not give warning when he

whose codes so many laws were borrowed or taken for the composition of the *Partidas*), two of the four private crimes of which *Justinian* makes mention in § *init. Inst. de Oblig. quæ ex del nasc*: and for a better understanding of them, and the actions for damage caused by animals, he refers thereto; and to the title of ditto, *De Leg. Aquil*: and to *Vinnius*, in his respective commentaries on the same. See also *Halifax on C. L.*, p. 72. ch. 24. p. 85. ch. 2.: also *Wood's C. L.*, p. 258. § 3. and p. 266.

<sup>40</sup> Or, adds *Palacios*, by other reason, L. 1. tit. 15. P. 7.

<sup>41</sup> See L. 2. tit. 15. P. 7., cited.

<sup>42</sup> Or by whose order or advice it was caused.

<sup>43</sup> And, adds *Palacios*, although the suit should not have been begun (contested is meant) before his death, if the heirs received any benefit from the damage caused by him from whom they take, they ought to make restitution to the amount of such benefit, L. 3. tit. 15. P. 7., cited.

<sup>44</sup> Given justly or rightly (*derechamente*), says L. 4. tit. 15. P. 7., cited; but otherwise, if such sentence be wrongfully (*tortisamente*) given. See the law referred to: but see Appendix T.

<sup>45</sup> See L. 5. tit. 15. P. 7., cited.



throws his bricks on the ground; he who lops the branches of a tree on the side of the road without giving notice of it, L. 6. and 25. tit. 15. P. 7. [L. 6. and 25. tit. 15. P. 7.] 4th, Equally guilty is he who sets traps (*trampas*), snares (*cepos*), and game traps (*armadijos*), in roads (*caminos*) or public places from which damage arises to the passengers; and likewise the person who, taming a wild animal,<sup>66</sup> does not watch him so as to prevent his doing harm, L. 7. tit. 15. P. 7. [L. 7. tit. 15. P. 7.] 5th, The physician, surgeon, farrier, &c., ought to pay the damage which they shall cause to their patient by their own fault, or for abandoning (*desamparar*) the cure, L. 8.<sup>67</sup> tit. 15. P. 7. 6th, Likewise is he bound to pay the damage who puts fire near straw, wood, corn, or other like thing, when there is wind, L. 10. tit. 15. P. 5.; [L. 10. tit. 15. P. 5.]; and the baker who does not take care of the fire in his oven, if by such cause what he is baking be lost or destroyed, L. 11. tit. 15. P. 7. [L. 11. tit. 15. P. 7.] 7th, Those are also responsible for any damage<sup>68</sup> done to merchandise in a ship, or other vessels, on board which they are kept, who shall do any thing by which the goods are deteriorated or lost, L. 13. tit. 15. P. 7. [L. 13. tit. 15. P. 7.] Innkeepers (*mesoneros*) and others, for the damage which the things hung up at their doors or windows cause to passengers, L. 16.<sup>69</sup> tit. 15. P. 7. Barbers who venture to shave in public, if they should do injury by wrangling (*por tropezar*) with another, L. 27. tit. 15. P. 7. [L. 27. tit. 15. P. 7.] 8th, Lastly, the destroyers of vines and plantations of trees, &c., are very guilty and deserving of punishment, L. 28. tit. 15. P. 7. [L. 28. tit. 15. P. 7.]

As regards the damage which animals cause to property and to persons, under the same principles, we establish, 1st, That whoever worries or terrifies a dog, or other animal, from which damage arises to another, he is bound to make reparation for it, L. 21. tit. 15. P. 7. [L. 21. tit. 15. P. 7.] 2d, That if the animal should do damage without the fault of the person who conducts it, it being tame, the owner is obliged to pay the damage,<sup>70</sup> L. 22. tit. 15. P. 7. [L. 22. tit. 15. P. 7.] 3d, The<sup>71</sup> same takes place with respect to a wild animal, which, on account of not being properly kept should do an injury to any person, L. 23. tit. 15. P. 7. [L. 23. tit. 15. P. 7.] 5th, In the like manner shall be made good the damage caused by cattle or stock (*ganado*) on the property of another

<sup>66</sup> Such as bulls, cows, &c. See L. 7. tit. 15. P. 7., cited.

<sup>67</sup> This law is erroneously cited for L. 9. tit. 15. P. 7.; and see *Greg. Lop.* Gl. 2 and 3, on this law.

<sup>68</sup> By boring a hole or otherwise. See L. 13. tit. 15. P. 7., cited.

<sup>69</sup> This law is erroneously cited for L. 26. tit. 15. P. 7.

<sup>70</sup> But if the animal should be goaded or provoked by a third person to do the damage, such person is liable, and not the owner of the animal. See L. 22. tit. 15. P. 7., cited.

<sup>71</sup> And a great deal more, adds *Palacios*, desiring reference to L. 23. tit. 15. P. 7., cited; such as paying double the amount of damage caused thereby, the expense of cure, if the injury be to the person, damages for loss of time, &c.; it is necessary to see the law cited to ascertain the extent of liability of the owner of the animal in this case.

person, the same being manifest,<sup>61</sup> and determined by the award (*á juicio*), of fit men (*hombres buenos*); and if this damage hath been occasioned with a malicious intention on the part of [ 228 ] the owner of the animals, he shall pay double,<sup>62</sup> L. 24. tit. 15. P. 7. [L. 24. tit. 15. P. 7.] This estimation of damages and prejudices (*perjuicios*) is left to the judgment of skilful persons (*peritos*), if the injury should be caused to real property: and in what regards the damage done by animals, attention must be had to the injury (*perjuicio*) which results to the owner of the thing injured, distinguishing the death from the wound only, or fracture of any limb,<sup>63</sup> L. 18. tit. 15. P. 7.

§ 2. Injury (*injuria*) is the same as dishonor (*deshonra*), which is done or said to another wrongfully (*á tuerto*), and in contempt of him, L. 1. tit. 9. P. 7. [L. 1. tit. 9. P. 7.] There are two kinds of injury, one by word (*de palabra*), and the other by deed (*de hecho*). In the first kind are included the injuries which result from libels and defamatory writings, L. 3.<sup>64</sup> tit. 9. P. 7. [L. 3. tit. 9. P. 7.] Of injury by deed<sup>65</sup> various examples are found in L. 4.<sup>66</sup> 5. and 6. tit. 9. P. 7. [L. 4. 5. and 6. tit. 9. P. 7.]

Of injuries or libels, some are heinous (*graves*), and others trifling (*leves*). Those which are heinous, are so either in respect of the heinousness (*gravedad*) of the act in regard of the place where done or committed, or of the person injured or libelled,<sup>67</sup> L. 20. tit. 19. P. 7.<sup>68</sup> [L. 20. tit. 19. P. 7.] Trifling ones are all those which do not require consideration with respect to these three things; whence arises the difficulty of determining a certain or prescribed punishment for this kind of crime, L. 21. tit. 9. P. 7. [L. 21. tit. 9. P. 7.]

In order to the libelling or injuring a person it is necessary to prove a determinate mind or intention (*determinado animo*) in the person who libels; and therefore such not being able to happen with respect to a minor of ten years and a half old, the madman, idiot, &c. it follows, 1st, That neither of them can injure or libel, L. 8. tit. 9. P. 7. [L. 8. tit. 9. P. 7.] 2d, That the judge who imprisons by reason or virtue of his office does not commit injury, L. 16. tit. 9. P. 7. [L. 16. tit. 9. P. 7.] 3d, Nor the minister who proposes any person to the king as more capable than another to exercise an office, L. 19. tit. 9. P. 7. [L. 19. tit. 9. P. 7.]

<sup>61</sup> It being manifest, or the person sustaining the injury being able to prove it; in which case, the damage ought to be estimated by skilful, respectable persons; this is observed by *Palacios*, who refers to L. 24. tit. 15. P. 7.

<sup>62</sup> This is in the case the owner put the animals there knowingly or intentionally (*á sabiendas*), as stated by L. 24. tit. 15. P. 7., cited.

<sup>63</sup> In Spain, says *Palacios*, according to some interpreters or commentators, the distinction of L. 18. tit. 15. P. 7., is not observed; but every damage which is occasioned through the fault of any one, is estimated or assessed by the discretion of the judge.

<sup>64</sup> L. 13. is erroneously cited in the text.

<sup>65</sup> Assault and battery.

<sup>66</sup> L. 4. does not apply to *injuria de hecho*.

<sup>67</sup> Or, adds *Palacios*, in respect of the person who libels, or of the libel itself.

<sup>68</sup> See also L. 8. tit. 25. lib. 12. Nov. Rec.

This action may be brought by all persons injured or their representatives,<sup>69</sup> as appears from the examples laid down in L. 8. 9. 10. 11. 12. 13. and 23. tit. 9. P. 7.; [L. 8. 9. 10. 11. 12. 13. and 23. tit. 9. P. 7.] and is at an end or is prescribed after a year, L. 22. tit. 9. P. 7. [L. 22. tit. 9. P. 7.] It is necessary to observe, that if the injury is done expressly to the person, who is found disguised or masked, he cannot complain of it; wherefore if a virtuous woman or one of good character goes disguised with the clothes or proper dress of a street walker or prostitute (*muger publica*), she cannot complain if they call her unchaste; nor can the clergyman, if he does not wear his [ 229 ] clerical habits, complain to the judge as a clergyman, L. 18. tit. 9. P. 7. [L. 18. tit. 9. P. 7.]

Cap. 4. The punishments common to all these crimes, are those which were established by the laws for the punishment of offences (*para castigo y escarmiento*), L. 1. tit. 31. P. 7. [L. 1. tit. 31. P. 7.] Punishment is therefore the compensation or satisfaction (*enmienda*) by fine or punishment which the law requires from or imposes upon any persons for the offences they have committed, L. 1. tit. 31. P. 7. [L. 1. tit. 31. P. 7.]

§ 1. We are only acquainted with two sorts, corporal punishment by which a man is punished in his person; and pecuniary<sup>70</sup> which always falls upon his property. Of these some are called ordinary punishments if they are determined or fixed by the laws, and those which are left to the discretion of the judge according to the circumstances of the crime, are called extraordinary or arbitrary. Of these punishments some are lawful, others unlawful. Those which are lawful are expressed in L. 4. tit. 31. P. 7. [L. 4. tit. 31. P. 7.] and are, the punishment of the gallows or hanging (*horca*), strangling (*garrote*), loss of limb (*perdimiento de miembro*), the mines (*minas*), the gallies (*galeras*), transportation (*destierros*), imprisonment (*carcel*), hard labor in the public works (*obras publicas*), infamy (*infamia*), shame (*vergüenza*), and public whipping inflicted by the hangman

<sup>69</sup> *Palacios* says, this means, that the action may be brought by those under whose power they are; and that, as at present, the daughter-in-law is not under the power of her stepfather, nor the grandchild under that of the grandfather, nor the great-grandchild under that of the great-grandfather, what is said in L. 9. tit. 9. P. 7. respecting these persons, will not hold: that it has been already said, in various places, that the married son is not under the power of his father. It may be observed, that the actions here treated of do not pass or descend to heirs, unless they should have been instituted and contested in the lifetime of the injured party, except the injury were done to the party during his last sickness, of which he died, or reflected on his memory after death, although this last may not be considered as an exception to the rule, but as a distinct right or remedy given to the living heir. See L. 23. tit. 9. p. 7. cited.

<sup>70</sup> *Palacios* says, we are acquainted also with the punishment of infamy, of which the text makes mention further on, and that of confiscation of property may be also added. But this last, the Translator may be permitted to observe, will come under the description of pecuniary punishment. *Lardizabal sobre las Pen.* cap. 5. p. 152. divides punishment into capital, corporal, infamous, and pecuniary; the second may be, however, said to include the first. *Gutierrez Prac. Crim.* 3 tom. cap. 6. p. 86. n. 1., mentions three kinds, corporal, infamous or stigmatizing, and pecuniary. Wood, in his *Inst. Civ. Law*, p. 334. book 4. chap. 4. reduces punishments to two sorts, capital and not capital.

(*de azotes*);<sup>71</sup> all other punishments are unlawful<sup>72</sup> according to L. 6. tit. 31. P. 7. [L. 6. tit. 31. P. 7.] It may be added that amongst us the following and other like punishments, being considered barbarous are obsolete; the delivering up the accused or culprit (*reo*) to the will and power of the injured party; burning alive unless for being a Jew;<sup>73</sup> the rack or torture on a wooden horse (*el ecuteo*);<sup>74</sup> throwing the culprit among wild beasts. Upon what has been said we establish, 1st, That the judges cannot mitigate nor increase the ordinary punishments, except in the cases which regard the circumstances of the heinousness of the offence, of the sex, of the age, and of the person against whom it is committed, L. 8. tit. 26. lib. 8. Rec.<sup>75</sup> L. 14. tit. 26. lib. 8. Rec. [L. 7. tit. 21. lib. 12. Nov. Rec.;] keeping in mind that when the commutation of punishments takes place, it is to be changed into that of the galleys,<sup>76</sup> L. 8. tit. 11. lib. 8. Rec. [L. 2. tit. 40. lib. 12. Nov. Rec.] 2d, That the extraordinary punishment ought to be proportioned to the circumstances of the crime,<sup>77</sup> L. 7. tit. 31. P. 7. [L. 7. tit. 31. P. 7.;] so that being corporal it be that of the

<sup>71</sup> One sort of punishment is omitted, which, for its peculiarity, should be mentioned. Exposure to the sun, some hour in the day, stripped naked, and rubbed over with honey, in order to be eaten or bitten by the flies. Seven sorts of punishment are set forth in L. 4. tit. 31. P. 7. viz.:—1st, Death, or loss of limb. 2d, Condemnation for life, to work in irons in the royal mines, or other works. 3d, Banishment or transportation for life, to some island or place, with confiscation of all property. 4th, Imprisonment in irons for life; but this punishment is limited to slaves. 5th, Banishment, or transportation for life, without confiscation or forfeiture of property. 6th, Punishment of infamy, or deprivation of office, or prohibition for an advocate or attorney to practise for a specified time, or for life. 7th, Public whipping, or condemnation to the pillory; or exposure to the sun in a state of nudity, for some hour in the day, with the body smeared over with honey, to be bitten by the flies, as mentioned in the beginning of this note.

<sup>72</sup> *Palacios* observes, that the pecuniary punishment, which is not here mentioned, is not unlawful; and some one of those mentioned in the text as lawful, however just it might have been in its origin, hath ceased to be in use, such as the loss of limb, and that even the punishment of condemnation to the galleys might be added, because at present they are not in a state to be used; and therefore, by the royal order, convicts are not destined or sent to them. He refers to the last note of this title. *Vide Post*.

<sup>73</sup> The Jews do not appear to have been a favored race among the Spaniards, if judgment may be formed from their enactments respecting them.

<sup>74</sup> This word has been translated as seen in the text; for torture generally was not entirely out of use in Spain, when these Institutes were written. *Lardizabal*, in his work upon punishments, published in 1782, and which was afterwards, it is believed, suppressed by the Inquisition, perhaps for the very reason about to be stated; namely, for having very properly inveighed against the absurd and useless inhumanity of this barbarous punishment, says, p. 285., with some degree of apparent exultation at its almost disuse, *en España mismo se usa ya muy pocas veces en los tribunales, &c.*; and a similar remark is made by a humane Spanish writer, on the criminal law of Spain, *Gutierrez*, tom. 1. p. 260. n. 50. *Practica Crim.* published 1804; who refers to this very observation of *Lardizabal* in the same spirit: and it was thought fit expressly to repeal torture by Art. 303 of the Political Constitution of the Spanish Monarchy, proclaimed in Cadiz, 19th March, 1812, and reproclaimed in March, 1820.

<sup>75</sup> This law does not apply, and the next cited in the text is not inserted in the *Nov. Rec.* *Palacios*, says, they are both erroneously cited for L. 8. tit. 31. P. 7., which declares, that the judges ought to examine the circumstances of the offender and the offence; and, according to what they shall find, to augment, diminish, or remit the punishment.

<sup>76</sup> *Palacios* refers to the last note made by him in the following title; which see *Post*.

<sup>77</sup> This may be virtually declared by L. 7. tit. 31. P. 7.

gallies, L. 6. tit. 24. lib. 4. Rec.<sup>76</sup> [L. 7. tit. 33. lib. 12. Nov. Rec.] 3d, That the punishment can be imposed only by the competent judge or the judge who has jurisdiction, L. 5. tit. 31. P. 7. [L. 5. tit. 31. P. 7.;] such amongst us for a capital punishment, being the king, his counsellors, *audiencias*, and inferior judges, provided that in the excepted crimes in which there is no appeal, the latter advise with their superiors upon the sentence, *vide Matheu de re criminali contr.* 3. 4th, That no person ought to be punished for the meditation or contemplation only of crime unless it be of treason [230] or of notorious heinousness (*gravedad notoria*),<sup>77</sup> L. 2. tit. 31. P. 7. [L. 2. tit. 31. P. 7.] 5th, That the relations and heirs of the offender ought not to partake of the punishment except in crimes of high treason (*de læsa majestad*), for which the infamy or disgrace passes to the children,<sup>80</sup> L. 9. tit. 31. P. 7. [L. 9. tit. 31. P. 7.] 6th, That the punishment being once decreed, cannot be changed, L. 9. tit. 31. P. 7. [L. 9. tit. 31. P. 7.] 7th, That the punishment of death must be executed publicly, L. 11. tit. 31. P. 7. [L. 11. tit. 31. P. 7.] 8th, That every punishment must be promptly carried into effect, unless it be that of death which is awarded to a pregnant woman, for then her delivery must be waited for, L. 9.<sup>81</sup> tit. 31. P. 7.

§ 2. There is another class of pecuniary punishments which are applied to the *Fisc*, and are called *penas de cámara*, which are not carried into effect, until the sentence passes into a thing adjudged (*cosa juzgada*), L. 1. tit. 26. lib. 8. Rec. [L. 1. tit. 41. lib. 12. Nov. Rec.] For the due accounting, &c. (*para la buen cuenta y razon*), of these penalties, their recovery and application,<sup>82</sup> a receiver general has been appointed who must conform to L. 8. tit. 6. lib. 2.; Ll. 20 and 21. tit. 1. L. 66. tit. 4. Ll. 11. and 35.<sup>83</sup> tit. 5. L. 19. tit. 7. L. 21. tit.

<sup>76</sup> This law does not apply. *Palacios* says, L. 6. tit. 24. lib. 4. is erroneously cited in the text for L. 6. tit. 24. lib. 8., which is L. 3. tit. 40. lib. 12. Nov. Rec., and does apply. He refers to his last note in the following title.

<sup>77</sup> Such as treason, homicide, and rape; when, by L. 2. tit. 31. P. 7., cited, if the person meditating the offence proceed, or begin to take steps towards effecting it, he is punishable as though he had completed the crime. But see *Greg. Lop.* Gl. 4. on this law. *Palacios* refers to L. 2. tit. 23. lib. 8. Rec., which is L. 3. tit. 21. lib. 12. Nov. Rec. See 3d vol. *Gutierrez, Prac. Crim.* p. 65. 66. &c. c. 4. n. 15. *et seq.* Also, 1st vol. *Villan.* p. 344. n. 20., and 3d vol. *Villan.* p. 41. n. 12.

<sup>80</sup> *Palacios* says, this is understood of males grown up to manhood (*varones*), and that *Azevedo*, on L. 2. tit. 18. lib. 2. Rec., even with respect to them, limits the infamy to cases only of treason against the person of the king (*læsa majestatis*), or against the commonwealth; that it is certain that such laws, which, from a particular motive, are extended to punish the innocent, ought to be interpreted or construed with all possible favor for their benefit.

<sup>81</sup> This law is erroneously cited for L. 11. *ibid.*

<sup>82</sup> For the collection or recovery of these penalties, their management, and distribution, says *Palacios*, there is an instruction of the 27th December, 1748, consisting of twenty-three chapters or articles. That by the royal order of the 12th April, 1779, the 20th chapter thereof is directed to be punctually observed; and by the 19th chapter of the instruction to corregidores, of 1788, they are ordered to comply with what is prescribed by the referred to instruction. Lastly, that another instruction of the 16th July, 1803, has been published for the government, administration, and benefit of the produce, or results of penalties, *de Cámara*, as an addition to that of 1748, cited.

<sup>83</sup> L. 35. tit. 5. lib. 3. Rec., is not inserted in the *Nov. Rec.*

9. lib. 3. and L. 18. tit. 26. lib. 8. Rec., [L. 10. tit. 41. lib. 12. Ll. 21. and 22. tit. 2. lib. 5., L. 11. tit. 41. lib. 12., L. 16. tit. 11. lib. 7., L. 7. tit. 41. lib. 12., L. 5. tit. 33. lib. 12., L. 7. tit. 21. lib. 12. Nov. Rec.] and others of the same collection.

§ 3. Punishment may cease by means of the pardon of the prince whose province it is to grant it, and not that of the magistrate,<sup>84</sup> Ll. 1. 2 and 3. tit. 32. P. 7. [Ll. 1. 2. and 3. tit. 32. P. 7.] The pardon or remission of the punishment does not take away the right which the persons may have to whom the property hath been given up,<sup>85</sup> L. 3. tit. 25. lib. 8. Rec. [L. 3. tit. 42. lib. 12. Nov. Rec.] In order to the validity of the pardon, it must be signed and sealed by the king and two of the council,<sup>86</sup> and only comprehends the crime which it expresses; so that a general pardon does not extend to any particular or special thing or case, Ll. 2. and 4. tit. 25. lib. 1. Rec. [Ll. 2 and 5. tit. 42. lib. 12. Nov. Rec.] The act (*carta*) of pardon is not valid if a sentence hath been passed for any crime, and it makes no mention of it, L. 2. tit. 25. lib. 8. Rec. [L. 2 tit. 42. lib. 12. Nov. Rec.] Pardons are regularly granted on Good Friday, and not more than twenty can be granted in each year, L. 2. tit. 15. lib. 8. Rec. [L. 2. tit. 42. lib. 12. Nov. Rec.]

<sup>84</sup> The council, chanceries, and *audiencias*, says *Palacios*, grant also pardons in their visits to the prisons, in the name of the sovereign; but their powers with respect to these visits, and pardons are reduced to discharging (*dar libertad*), or enlarging on bail (*ampiar la carceleria*), persons imprisoned by the royal ordinary jurisdiction, except it be for crimes which his majesty is wont to except in acts of general pardons: he refers to *Gutierrez Prac. Crim.* tom. 1. c. 11. See *ibid.* n. 17 and 18. p. 338.

<sup>85</sup> That is, the pardon does not affect the rights of third persons.

<sup>86</sup> See *Gutierrez*, 1st. vol. c. 4. p. 329, *et seq.*, respecting matters connected with this subject. See also *Proviso* in Cl. 17. Order in Council, Appendix F.

## TITLE XX.

OF THE PROPORTION WHICH THE LAWS OF SPAIN ESTABLISH BETWEEN  
CRIMES AND PUNISHMENTS.

[ 231 ] In proportion to the heinousness (*gravedad*), the malice, and the circumstances of the crimes, our laws have imposed corresponding punishments, a statement of which is communicated in this title, forming a catalogue thereof in alphabetical order; but it is proper to observe, that practice has altered the punishments in many of them.

*Advocates*<sup>1</sup> who do not practise or pursue their profession according to law, or are guilty of falsehood and malice, pay all the damages and prejudices they may cause to the parties, besides double the amount. L. 6. tit. 16. lib. 2. Rec. [L. 9. tit. 22. lib. 5. Nov. Rec.]

*Adultery*,<sup>2</sup> the woman who commits it ought to be whipped publicly (*azotada*), and shut up in a monastery with the loss of her *dote* and *arras*; and the adultery being followed with flight from her husband's house, she also loses her ganancial property, L. 5. tit. 20. lib.

<sup>1</sup> The advocate, says *Palacios*, who shall agree with his client to receive part of the thing in dispute, or sued for, ought to be deprived of office, as infamous, L. 14. tit. 6. P. 3., that he who shall make any discovery to the adverse party, and in prejudice of his own, and he who shall knowingly allege or cite false laws, ought to be banished for life to some island, and forfeit all his property in favor of his relations; and if he should not have any within the third degree, in favor of the king, L. 1 and 6. tit. 7. P. 7. That by the law of the *Recopilacion*, and according to the one which the text cites, the advocate, who, by his malice, fault, negligence, or unskilfulness, shall occasion damage to his clients, is bound to make it good to them, and to pay double the amount besides; although this penalty of paying double the amount is not in practice. That the advocate who shall recapitulate what is already written in the process, ought to pay 600 maravedis, L. 4. tit. 16. lib. 2. Rec.: or L. 1. tit. 14. lib. 11., Nov. Rec. That in practice, they are also admonished and fined, &c., according to their excesses and defects.

<sup>2</sup> By L. 15. tit. 17. P. 7., says *Palacios*, the adulterer was punished with death, and the adulteress with whipping (*azotes*), and reclusion (in a monastery), and loss of *dote* and *arras*. That by L. 1. tit. 20. lib. 8. Rec., which is L. 1. tit. 28. lib. 12., Nov. Rec., both of them, and their respective property (if they have no children) ought to be placed in the power of the husband to do what he shall please with them; but that, at present, the punishment is reduced to banishment, or confinement in a house of correction (*presidio*), as regards the adulterer; and reclusion (confinement in a monastery,) as regards the adulteress. That as respects the relations, it was never permitted them to kill the adulterers as the text erroneously cites; that it is only the father who may kill with impunity his daughter guilty of adultery; but for this it is necessary that he find her committing the adultery in his house, or in that of his son-in-law, and that he kill, at the same time, the adulterer, L. 14. tit. 17. P. 7. That the text also erroneously cites L. 5. tit. 20. lib. 8. Rec., in support of what it advances. That what L. 7. tit. 2. lib. 3. *Fuero Real*, says, is, that the woman loses her *arras* if she goes away from the house with the design to commit adultery, although it may not be proved nor effectuated through any impediment. See also what L. 15. tit. 17. P. 7., says with respect to this last case; and see also *Greg. Lop.* Gl. 1. L. 14. tit. 17. P. 7., with respect to what is said above, as to a father being permitted to kill his daughter, when taken in adultery.

8. Rec.<sup>3</sup> [L. 5. tit. 28. lib. 12. Nov. Rec.] The man ought to be banished, for the punishment of death imposed by L. 15. tit. 17. P. 7. has been mitigated. At present, the laws which permitted relations to kill the adulterer are obsolete.

*Sorcerers, and persons practising witchcraft*, suffer the punishment of transportation,<sup>4</sup> Ll. 6. 7. and 8. tit. 3. lib. 8. Rec. [Ll. 2. and 3. tit. 4. lib. 12. Nov. Rec.] *Tumultuous meetings*<sup>5</sup> (*asonadas*), *assemblies of troops* (*apellidos*), *factions* (*bandos*), *parties* (*parcialidades*), *revolts* (*levantamientos*), &c., are prohibited under penalty of transportation, and of death for the third offence, L. 6. tit. 15. lib. 8. Rec. [L. 8. tit. 12. lib. 12. Nov. Rec.]

*Associations* (*ayuntamientos*), and *leagues* (*ligas*), &c.; no corporation or council, nor other persons can form them, L. 1. tit. 14. lib. 8. Rec. [L. 1. tit. 12. lib. 12. Nov. Rec.,] not even under the pretext of *cabildos* or societies (*cofrades*), except those already formed with royal permission, L. 3. tit. 13. lib. 8. Rec. [L. 12. tit. 12. lib. 12. Nov. Rec.,] also those of ecclesiastics are prohibited, L. 5. tit. 14. lib. 8. Rec. [L. 3. tit. 12. lib. 12. Nov. Rec.,] and those of students which are called factions (*bandos*), L. 1. tit. 7. lib. 1. Rec. [L. 4. tit. 12. lib. 12. Nov. Rec.]

*Pimps* (*alcahuetes*). The punishment of one hundred stripes (*azotes*), and ten years' condemnation to the galleys ought to be inflicted upon them for the first offence; for the second, stripes and

<sup>3</sup> See L. 15. tit. 17. P. 7., which is meant to be cited.

<sup>4</sup> Sorcerers, &c., *Palacios* says, the laws which the text cites do not impose the penalty of transportation or banishment as is there said, but that of death; but that of death being so rigorous a punishment, says *Vizcaino* in his *Código Criminal*, 1 *pal. adivinos*, num. 15., the custom of the tribunals hath moderated it into that of whipping (*azotes*), and being covered with feathers and crowned with a cap as a mark of infamy or disgrace (*emplumados y encorazados*). See 3d vol. *Gutierrez Prac. Criminal*, p. 22. n. 26; it is there said, with reference to the author quoted by *Palacios*, that the punishment of whipping is inflicted on men, and that of feathering and crowning on women guilty of the practice of sorcery, &c.

<sup>5</sup> *Palacios* says, under this term is understood every commotion or insurrection. That the *Pragmatic* of 17th April, 1774, L. 5. tit. 11. lib. 12. Nov. Rec., which points out to the judges the mode of proceeding when they happen, orders the imposition, in such cases, of the punishments which the laws determine, without saying what laws these are; that there are various laws which treat of this matter, and by them regard is had to the person against whom the offence is directed, the mode and circumstance which intervene, with all that accompanies it; and that thus shall the offender be punished, sometimes by death, with confiscation of property; at others, with the galleys; at others, with banishment or transportation; and for the most, not to mention all, as *Azevedo* on L. 1. tit. 15. lib. 8. Rec. (not in Nov. Rec.), by an arbitrary punishment on the part of the sovereign, to whom an account shall be given according to the same law. That the said *Pragmatic* of 1774, directs these causes to be instituted or formed by the ordinary judges, according to the rules of law, advising upon their sentences with the courts *Del Crimen* or *De Corte*, of their respective districts; or with the council, if necessity requires it. He refers to L. 3. tit. 19. P. 2.; to Ll. 16. and 17. tit. 26. P. 2.; Ll. 1. and 2. tit. 2. P. 7.; Ll. 2. and 8. tit. 10. P. 7.; L. 1. tit. 7. lib. 1. Rec.; some laws of tit. 14. lib. 8. Rec.; and of tit. 15. lib. 8. *ibid.* He concludes by stating, that an *Aut. Accord.* of 5th May, 1766, L. 3. tit. 11. Lib. 12. Nov. Rec. says, among other things, that those who should commit this crime, on suffering the punishment of the law, shall be marked as enemies of their country, and their memory shall be infamous to all civil effects, and the guilty consequences shall follow without prescription or limitation of time.



[ 232 ] perpetual condemnation to the galleys, although they may be under twenty years of age, L. 5. and 10. tit. 11. lib. 8. Rec. [L. 2. tit. 27. lib. 12. Nov. Rec.,] and for the third the penalty of death,<sup>6</sup> L. 4. tit. 11. lib. 8. Rec. [L. 1. tit. 27. lib. 12. Nov. Rec.] These punishments include husbands who consent to the prostitution of their wives, L. 9. tit. 20. lib. 8. Rec. [L. 3. tit. 27. lib. 12. Nov. Rec.]

*Concubinage (amancebamiento).* The married man who lives in concubinage with a single woman, is obliged to endow her (*dotarla*) in the fifth of his property to the amount of 1000 maravedis, L. 5. tit. 19. lib. 8. Rec. [L. 1. tit. 26. lib. 12. Nov. Rec.,] and if she is married, he forfeits the half of his property, L. 6. tit. 19. lib. 8. Rec. Ll. 1, 2, 3 and 4. tit. 19. lib. 8. Rec. and L. 4. tit. 19. lib. 8. Rec.<sup>7</sup> [L. 2. tit. 26. lib. 12. Nov. Rec. Ll. 3, 4 and 5. tit. 26. lib. 12. Nov. Rec.,] speak of the concubines of the clergy.

*Arms prohibited.* No person can carry pistols, blunderbusses (*trabucos*), which are not a yard long, daggers (*dagas*), poniards (*puñales*), &c., under penalty of six years' condemnation to the mines if he is a plebeian, and if he be a nobleman, six years' imprisonment (*de presidio*) *Pragmatica de 29 Abril, 1761.* [L. 19. tit. 19. lib. 12. Nov. Rec.] Nobles may make use of horse pistols (*pistolas de arson*). To coachmen and footmen, the use of the sword is forbidden under penalty of ten thousand maravedis, and one year's transportation,<sup>8</sup> L. 26. tit. 23. lib. 8. Rec.<sup>9</sup> See Ll. 16, 17, 18 and 19. tit. 23. lib. 8. Rec. [Ll. 5 and 6. tit. 19. lib. 12. Nov. Rec.]

*Faro banks* are prohibited, *Auto* 4. tit. 7. lib. 8.<sup>10</sup> [Nota 7. tit. 23. lib. 12. Nov. Rec.]

*Bigamists* are punishable with two hundred stripes, and ten years' condemnation to the galleys, L. 8. tit. 20. lib. 8. Rec.<sup>11</sup> [L. 9. tit. 28. lib. 12. Nov. Rec.]

<sup>6</sup> *Palacios* says, that practice has reduced the punishments mentioned in the laws cited by the text to exposing such offenders, if men, to public disgrace, with a crown or cap of disgrace (*coroza*); and if the husband, with horns; and if women, to being feathered (*emplumadas*); and afterwards, the former are punished with more or fewer years of imprisonment (*de presidio*); and the last with confinement in the cloister of San Fernando. By the law of the *Partidas*, he who for money was the pimp, or procured the prostitution of his wife, or of other married woman, virgin or nun, or widow of good character, was liable to suffer death, L. 2. tit. 27. P. 7.; this last law cited by the Learned Professor does not apply.

<sup>7</sup> This law is not inserted in the *Nov. Rec.*

<sup>8</sup> *Palacios* refers upon this subject to royal orders of 29th September, 1791, September, 1760, and 3d March, 1774; also to his last note in this title.

<sup>9</sup> This law is not inserted in the *Nov. Rec.* In the edition of *Palacios*, L. 20. tit. 23. lib. 8. Rec., is cited.

<sup>10</sup> See also L. 15. tit. 23. lib. 12. Nov. Rec.

<sup>11</sup> Into public disgrace (*vergüenza publica*), one and ten years condemnation to galleys. See also Ll. 6, 7, 8, and 10. tit. 28. lib. 12.: and see also L. 16. tit. 17. P. 7., which is altered by L. 8. tit. 28. lib. 12. Nov. Rec., with respect to the mode of punishment, and his punishment is extended by L. 9. *ibid.*, cited in the text. *Palacios* says, in the case of the woman being cognisant of the first marriage of the man, her punishment is banishment or confinement in a monastery.

*Blasphemers of God* and the most holy Virgin (*Maria Santisima*). Their tongues are cut out, and they are to receive one hundred stripes, if the crime be committed in the court (*corte*), and if out of it, their tongue is to be cut out, and one half of their property confiscated,<sup>12</sup> L. 2. tit. 4. lib. 8. Rec. [L. 2. tit. 5. lib. 12. Nov. Rec.]

*Blasphemers*<sup>13</sup> of the king. If they have children, half of their property is to be confiscated; if they have none, they forfeit the whole of it, deducting the debts due by them, *dote*, &c., L. 3. tit. 4. lib. 8. Rec. and L. 16. tit. 26. lib. 8. Rec. [L. 2. tit. 1. lib. 3. and L. 5. tit. 17. lib. 7. Nov. Rec.], and besides, they suffer ten years' condemnation to the galleys, L. 7. tit. 4. lib. 8. Rec.<sup>14</sup> [L. 7. tit. 5. lib. 12. Nov. Rec.]

*Drunkard (boracho)*. He who in this state kills another, is punishable with five years' transportation, L. 5. tit. 8. P. 7. [L. 5. tit. 8. P. 7.]

*Gaming-houses and tables* are prohibited under the penalties set forth in *Aut.* 2. and 3. tit. 7. lib. 8. Rec. [Notas 4. and 5. tit. 23. lib. 12. Nov. Rec.]

He who makes or breaks a hole or place in any house (*el que forada alguna*) by which a man may enter to commit a burglary or offence (*á hacer maleficio*), forfeits half of his property for the use of the fisc. (*para la cámara*), L. 6. tit. 26. lib. 8. Rec. [L. 9. tit. 15. lib. 12. Nov. Rec.]

*Roads and Streets*. He who stops them up, or obstructs them, pays a fine to the crown (*cámara*) of one hundred maravedis,<sup>15</sup> L. 5. tit. 26. lib. 8. Rec. [L. 1. tit. 35. lib. 7. Nov. Rec.]

*Gelder*, a person who castrates another. *Vide Homicidia*.

*Smugglers (contrabandistas)* incur the punishment set forth in *Auto*<sup>16</sup> 6. and 9. tit. 8. lib. 9. Rec. [L. 2. tit. 19. lib. 9. Nov. Rec.], and

<sup>12</sup> See all the Laws of tit. 5. lib. 12. Nov. Rec. *Palacios*, after stating the certainty of the commission of this crime, and of unlawful swearing, laments that neither the punishments prescribed by the laws (a sample of which is given in L. 2. tit. 5. lib. 12. Nov. Rec., cited in the text), nor others more mild are inflicted. The fair answer that might be given to this lamentation of the learned Professor is, that the extreme severity of these laws defeats their own object, and secures a sort of impunity for the commission of such offences.

<sup>13</sup> This word, it may be permitted to remark, is generally confined to designate those who speak impiously or irreverently of God; and it is, therefore, a species of blasphemy to apply it to libellers of the king, or any human being. Those of the superior class, guilty of the alleged offence, says *Palacios*, are immediately arrested and sent to the king, or an account may be given to him of the fact, in order that he may order the infliction of the deserved punishment; and if of another class, they forfeit all their property, if they have no children; and if they should have any, they lose the half: he refers to L. 3. tit. 4. lib. 8. Rec. (L. 2. tit. 1. lib. 3. Nov. Rec.)

<sup>14</sup> *Palacios*, properly, observes, that this law only relates to blasphemy against God, which is our understanding of the word; and he adds, that L. 16. tit. 26. lib. 8. Rec.; (L. 5. tit. 17. lib. 7. Nov. Rec.), also cited in the text, does not treat of the subject. The law quoted in the edition of the text by the learned Professor, is L. 16. tit. 16. (not tit. 26.) lib. 8. Rec.: now there is no such law as that referred to by the learned Professor; L. 9. being the last law in the title and Book so referred to.

<sup>15</sup> And besides, adds *Palacios*, referring to the law cited in the text, must remove or abate the obstruction or nuisance at his own cost.

<sup>16</sup> This *auto* is not inserted in the *Nov. Rec.*

by a decree of 10th December, 1760, that of imprisonment (*de presidio*) and loss of office; as likewise those who make use of rappee snuff (*tabaco rapé*), *Instruct. de 22 Julio*, 1761.<sup>17</sup>

*Associations (cofradías)* of officers may not be formed, under penalty of ten thousand maravedis for each offender, and transportation for one year, L. 4. tit. 14. lib. 8. Rec. [L. 13. tit. 12. lib. 12. Nov. Rec.]

*Dice (dados)* may not be made nor sold in the kingdom; and no one may play at them, under pain of transportation for five years; a fine of two hundred ducats if the delinquent is an *hidalgo*; and, if a plebeian, of one hundred stripes, five years' condemnation to the galleys, and a fine or forfeiture of thirty thousand maravedis,<sup>18</sup> L. 13. tit. 7. lib. 8. Rec. [L. 11. tit. 23. lib. 12. Nov. Rec.,] which increases the punishment prescribed by L. 7. tit. 7. lib. 8. Rec. [L. 6. tit. 23. lib. 12. Nov. Rec.]

*Defrauders of royal rents (defraudadores de rentes reales)*. He who impedes their recovery, or aids in this impediment (*embarazo*), is punishable with death,<sup>19</sup> L. 1. tit. 8. lib. 9. Rec. [L. 7. tit. 15. lib. 12. Nov. Rec.] If any one hinders the obtaining (*sacra*) a pledge or security (*prenda*) from the debtor of the king, he is punishable with a year's transportation, and subject to the payment of four times the amount of the expenses,<sup>20</sup> L. 4. tit. 8. lib. 9. Rec. [L. 6. tit. 31. lib. 11. Nov. Rec.]

*Duel or challenge (desafío)*. He who sends a challenge forfeits his property, L. 10. tit. 8. lib. 8. Rec. [L. 1. tit. 20. lib. 12. Nov. Rec.] As to what relates to the act of going out to fight or fighting,<sup>21</sup> (*de reñir*), it is prohibited with the punishment of death, forfeiture of property, &c.,<sup>22</sup> L. 1. tit. 8. lib. 8. Rec. [L. 2. tit. 20. lib. 12. Nov. Rec.]; See *Pragmat. 28. Abril*, 1757.

*Person excommunicated (descomulgado)*. For being so thirty days, he is obliged to pay six hundred maravedis; and if he should be so during six months, he must pay six thousand maravedis; and, after that, one hundred maravedis for each day, and be banished [ 234 ] from the place, under pain, in case of returning, of confiscation of his property,<sup>23</sup> L. 1. tit. 5. lib. 8. Rec. [L. 5. tit. 3. lib. 12. Nov. Rec.]

<sup>17</sup> *Palacios* refers to the royal *cedula* of 8th June, 1805, as governing on this subject.

<sup>18</sup> And the houses in which games of dice are played, are declared forfeited. See L. 11. tit. 23. lib. 12. Nov. Rec., cited in the text; also L. 15., *ibid*.

<sup>19</sup> L. 7. tit. 15. lib. 12. Nov. Rec., cited, adds to this forfeiture of property.

<sup>20</sup> Besides payment of the amount of the taxes, respecting which the resistance or hindrance was made. *Palacios* observes, that the royal *cedula* of 8th June, 1805, is what governs on this subject of the text: he refers previously to L. 19. tit. 8. lib. 9. Rec., L. 1. tit. 19. lib. 9. Nov. Rec., as containing various degrees of punishment, with reference to the circumstances, for such offence.

<sup>21</sup> This may be thought a liberty with the text, but it is the language or sense of L. 2. tit. 20. lib. 12. Nov. Rec., cited.

<sup>22</sup> See note <sup>25</sup>, p. 228. *ante*.

<sup>23</sup> The law cited, says half of his property. *Palacios* adds, that these penalties mentioned in the text are incurred when excommunication were by denunciation of the church, and the sentence published and not appealed from, or the appeal not continued or prosecuted.

*Defloration or debauchment of a maid (desfloro de doncella honesta).* The debaucher (*desflorador*) is obliged to endow her (*dotarlo*), or to marry her, L. 1. tit. 19. P. 7.<sup>24</sup> [L. 1. tit. 19. P. 7.] In practice some discretionary punishment is added, according to the circumstances. If the offence is committed in an uninhabited place (*despoblado*), he is punishable with death, L. 3. tit. 2. P. 3.,<sup>25</sup> which practice is commuted into imprisonment (*presidio*), condemnation to the mines, &c., according to persons and cases. The violation of a nun (*monja*), although only attempted, is punished with death,<sup>26</sup> L. 2. tit. 19. P. 7.<sup>27</sup> [L. 2. tit. 19. P. 7.]

*The receiver or concealer (encubridor) of heretics* forfeits the house or place in which he receives or conceals them; and if it is hired, he is bound to pay ten pounds of gold to the crown (*cámara*), and not having wherewithal to pay, he must be punished with stripes (*azotes*), L. 5. tit. 26. P. 7. [L. 5. tit. 26. P. 7.]; and in case of protecting them,<sup>28</sup> he must be banished from the dominions of his majesty, L. 6. tit. 26. P. 7. [L. 6. tit. 26. P. 7.]

*Receivers of cattle stealers* are punishable with ten years' transportation, L. 19. tit. 14. P. 7. [L. 19. tit. 14. P. 7.]

<sup>24</sup> L. 1. tit. 19. P. 7., cited, does not declare what is set forth in the text.

<sup>25</sup> L. 3. tit. 2. P. 3., cited, does not apply.

<sup>26</sup> L. 2. tit. 19. P. 7., does not state what is here set forth in the text.

<sup>27</sup> *Palacios* observes, that the punishment for the defloration or debauchment of a maid or widow of chaste character by L. 1., or rather by L. 2. tit. 19. P. 7., is very different from that which is here stated by the text. But let that be as it may, that at present mere defilement is punished by condemning the delinquent to endow, or to marry such person; and if the circumstances of the dishonored person require it, condemning him to imprisonment (*á presidio*), or to be married to her. That if this offence hath been committed in an uninhabited or lone place (*en despoblado*), or the maid is not marriageable (*viripotente*), or the offence is among persons between whom marriage cannot take place, he is punished with corporal punishment at the discretion of the judge, according to the circumstances. That in cases of defilement where bail is given by the defendant for appearance to the action, and payment of the judgment or sentence, he may not be molested with imprisonment nor arrests; and if the defendant should not be able to give bail or security for such appearance and payment of the judgment or sentence, he may be allowed the liberty of the town for his prison, on giving juratory caution to present himself whenever he shall be ordered, and to comply with the decision which shall be given on the cause. He cites the royal cedula of 30th October, 1796. [L. 4. tit. 29. lib. 12. Nov. Rec.] That in practice, if there is no complaint at the instance of the party, this crime is not proceeded in *de oficio*, unless to provide for the safety of the offspring (*feto*), if there is any and to admonish in such case the delinquents, the whole with the greatest secrecy, for the great degree in which the honor of the dishonored fair one is involved. That with respect to the defilement of a nun, the punishment by L. 2. tit. 19. P. 7. is the same for that of a virgin or widow of good character. He refers to L. 2. tit. 19. P. 7. for the punishment which servants, or slaves, incur (namely, burning), who commit this offence of constupration (*estupro*), or have other carnal communication with the female relation, maid servant, or other women of the house of their master, referring to L. 4. tit. 20. lib. 6. Rec. (L. 3. tit. 29. lib. 12. Nov. Rec.) which, he says, mitigates the punishment of L. 6. tit. 20. lib. 8. Rec. (L. 3. tit. 16. lib. 6. Nov. Rec., which does not apply), and much more that of the Partida cited.

<sup>28</sup> After being excommunicated by sentence of the church, and being contumacious for a year, and the punishment, in addition to banishment declared in the text, is infamy and unfitness to hold office or place of honor; and if the person protecting were a lord of any place or castle, he loses his seignory thereof; and if he should be a person of low condition, his body, and all he possesses, are at the mercy or disposal of the king to inflict such punishment as he shall deem the offence to merit.

*Receivers of challenges (desafios)* are punishable with banishment,<sup>29</sup> *Auto* 1. tit. 8. lib. 1. Rec. [L. 2. tit. 20. lib. 12. Nov. Rec.]

*Receivers of delinquents, or guilty persons.* If upon being required by justice they do not surrender the offender (*reo*), they are punishable with banishment, L. 4. tit. 16. and L. 6. tit. 22. lib. 8. Rec. [L. 3. tit. 18. lib. 12. and L. 1. tit. 11. lib. 12. Nov. Rec.]

*Stellionate (estellionato)*, or frauds in contracts, is punished by making good the damages and prejudices (*perjuicios*), L. 3. tit. 19. P. 7. [L. 3. tit. 19. P. 7.] The heir may institute this action, but not against him who was compelled to purchase,<sup>30</sup> L. 3. tit. 16. P. 7. and L. 6. tit. 11. lib. 5. Rec. [L. 3. tit. 16. P. 7. and L. 2. tit. 1. lib. 10. Nov. Rec.]

*Forgers or counterfeiters of royal seals.* This offence is punished with death, and the confiscation of one-half of the offender's property,<sup>31</sup> L. 6. tit. 7. P. 7. and Ll. 3. and 5. tit. 17. lib. 8. Rec. [L. 6. tit. 7. P. 7. and L. 1. tit. 8. lib. 12. Nov. Rec.]

*Counterfeiters of money.* For coining it out of the royal mints, the punishment is death and burning, with forfeiture of property to the crown, and confiscation of the house in which the money is coined, Ll. 11. and 67.<sup>32</sup> tit. 21 lib. 5. Rec. and L. 4. tit. 6. lib. 8. Rec.<sup>33</sup> and L. 16. tit. 7. P. 7. [L. 1. tit. 17. lib. 9. Nov. Rec., L. 3 tit. 8. lib. 12. Nov. Rec. and L. 2. tit. 22. lib. 12. Nov. Rec.]

[ 235 ] *Counterfeiters of weights and measures.* For making use of unlawful weights and measures, the penalty is payment of five *sueudos* for each false weight, and if the person is a money changer (*cambiador*), ten *sueudos* for the first time; for the second, double the penalty; and for the third, a hundred *maravedis* and transportation, L. 1. tit. 13. lib. 5. Rec.<sup>34</sup> [L. 1. tit. 9. lib. 9. Nov. Rec.;] although with respect to this punishment, the custom of each place chiefly governs; see Ll. 15. and 16. tit. 22. lib. 5. Rec.<sup>35</sup>

<sup>29</sup> See note,<sup>25</sup> p. 245. *ante*.

<sup>30</sup> It would seem that this plea of *engaño*, or *Lesion*, is not available with respect to property sold publicly at judicial sale under appraisement. See *Azevedo* on L. 6. tit. 11. lib. 5. Rec.

<sup>31</sup> This confiscation would seem to extend to the whole of the offender's property. See L. 3. tit. 8. lib. 12. Nov. Rec. *Palacios* observes that such offenders are punished as counterfeiters of money, and refers to the royal instruction of 1794.

<sup>32</sup> The same punishment is applicable by this law to clippers, as well as counterfeiters or coiners, of money; and, although it attaches forfeiture of property to the commission of the offence, it declares that only half such property shall devolve to the crown, one moiety of the other half being allotted to the accuser, and the remaining moiety of such half to the judge who shall condemn or give sentence against the offender.

<sup>33</sup> This law is erroneously cited, it applies to the offence of usury.

<sup>34</sup> See the exceptions mentioned in this law.

<sup>35</sup> *Palacios* says, that this law cited in the text refers to former ones, and that by L. 7. tit. 7. P. 7., the weights and measures ought publicly to be broken before the doors of the person who used them, who ought to pay to those he defrauded double the amount of such fraud or injury, and moreover to be banished for a certain time at the discretion of the judge. The law referred to by the learned Professor, L. 7. tit. 7. P. 7., says, at the discretion of the king; although note 2. to the edition of the *Partidas* of 1807, by the Royal Academy of History, Madrid, says, at the discretion of the judge or the king; thus supporting his statement. The Professor adds, that at present the offenders mentioned in this part of the text are punished by fine (*multa*).

<sup>36</sup> These laws are not inserted in the *Nov. Rec.*

A *false escribano* is punished with four years' imprisonment, privation of office, costs, &c., L. 4. <sup>37</sup> &c. tit. 17. lib. 8. Rec. [L. 4. &c. tit. 6. lib. 12. Nov. Rec.]

*False witness*, in civil causes, is to be punished with ten years' condemnation to the galleys; and in criminal cases in which the punishment for the offence charged does not extend to death, public disgrace (*vergüenza*), and perpetual condemnation to the galleys, L. 7. tit. 17. lib. 8. Rec. <sup>38</sup> [L. 5. tit. 6. lib. 12. Nov. Rec.]

*Disseizor (forzador) of ecclesiastical or church property.* If he does not restore it, execution shall be levied on his property for double the amount of what he shall have taken, <sup>39</sup> L. 9. tit. 12. lib. 8. Rec. [L. 6. tit. 5. lib. 1. Nov. Rec.]

*Ravisher of women* is to suffer death, and his property is to be applied to the ravished woman, <sup>40</sup> L. 3. tit. 20. P. 7. [L. 3. tit. 20. P. 7.]

*Gipsies* ought to be banished from the kingdom within six months; so that those found without employment and without the means of living are to be sent to the galleys, and to incur the punishment prescribed by L. 11. <sup>41</sup> and 12. tit. 14. lib. 8. Rec. [L. 5. tit. 31. lib. 12., L. 1. tit. 16. lib. 12. Nov. Rec.] They cannot live in places but where there are upwards of one thousand inhabitants, nor can they deal in the purchase and sale of cattle, L. 15. and *Auto* 5. tit. 11. lib. 8. Rec.; [L. 4 and 6. tit. 16. lib. 12. Nov. Rec.] and it is only permitted them to exercise the employment of laborers (*labranza*), *Auto* 1. and L. 17.

<sup>37</sup> This law applies to the perjury of witnesses. *Palacios* observes, that neither L. 4., quoted in the text, nor any other law of tit. 17. lib. 8. Rec., appoints the punishment asserted by the text. That by L. 16. tit. 19. P. 3., the hand of the false escribano with which he forged or drew the false deed or instrument is cut off; he cannot be a witness, nor enjoy any honor during life, and remains for ever infamous; also L. 6. tit. 7. P. 7.:—most just laws, he is pleased to say, which should be in their full vigor, so that they may be enforced; but adds, that at present, according to the falsehood or forgery, and its circumstances, the offenders are punished by fines, admonitions (*apercibimientos*), privation of fees or office, by imprisonment, &c.

<sup>38</sup> This law extends the same punishment to subornation of perjury as it does to the offence of perjury itself. *Palacios* says, that by L. 4. tit. 17. lib. 8. Rec. (L. 4. tit. 6. lib. 12. Nov. Rec.), the punishment *talionis* is visited upon persons giving false testimony in criminal causes, in which corporal punishment attends the conviction of the offence charged. That in other criminal and in civil cases, the persons guilty of perjury are punished by extraction or deprivation of their teeth, L. 3. tit. 12. lib. 4. *Fuero Real*. That by the law cited in the text, the punishment was commuted in civil causes into that of public disgrace (*vergüenza publica*), and ten years' condemnation to the galleys, and in criminal causes not extending to death, in which the same punishment must be inflicted, into public disgrace, and condemnation for life to the galleys. He refers to his last note on this title: notwithstanding, adds the learned Professor, in practice, scarcely ever is it seen that false witnesses are punished, which is a reason why false witnesses are found to prove whatever may be desired.

<sup>39</sup> *Palacios* says that, according to the law cited in the text, if the offender do not restore the property, he ought to pay double the amount in addition to the value or amount of what he took; but that in practice this punishment of paying double the amount of the property taken is not observed.

<sup>40</sup> This, says *Palacios*, applies to the ravishment of widows of good fame, or virgins, or married women, or nuns; and he adds, that L. 8. tit. 11. lib. 8., Rec. (L. 2. tit. 40. lib. 12. Nov. Rec.,) commutes the punishment of death imposed by L. 3. tit. 20. P. 7., into that of condemnation to the galleys. See L. 3. tit. 20. P. 7., quoted in the text; by which it would appear, that a rape committed on other women, such as prostitutes, &c., is punishable at the discretion of the judge.

<sup>41</sup> This law applies to vagrants generally.

tit. 11. lib. 8. Rec., [Nota 1. tit. 16. lib. 12. Nov. Rec.,] all which is found laid down more comprehensively in L. 16. and *autos* 7, 8, 9, and 15. tit. 11. lib. 8. Rec.<sup>42</sup> [Ll. 7. 8. and 9. tit. 16. lib. 12. Nov. Rec.]

*Heretics*<sup>43</sup> cannot exercise public employments, and are liable to be punished with confiscation of property, Ll. 1, 2, 3, and 4. tit. 3. lib. 8. Rec.; [Ll. 1, 2, 3, and 4. tit. 3. lib. 12. Nov. Rec.] neither can they be constituted heirs, L. 4. tit. 3. P. 6. nor be witnesses, L. 8. tit. 16. P. 3. and L. 9. tit. 1. P. 6.

[236] *Foundling, or child abandoned (echado) by his father:*<sup>44</sup> the latter loses the right of his being heir to his son, L. 1. tit. 23. lib. 4. *Fuero Real*.

*Homicide* is punishable with death, Ll. 8. 10. and 15. tit. 8. P. 7. [Ll. 8. 10. and 15. tit. 8. P. 7.] and Ll. 2. and 3. tit. 23. lib. 8. Rec. [Ll. 3. and 4. tit. 21. lib. 12. Nov. Rec.]; unless it were committed in self defence, or by killing the robber who should be found robbing, L. 4. tit. 23. lib. 8. Rec.<sup>45</sup> [L. 1. tit. 21. lib. 12. Nov. Rec.] He who castrates another is considered a murderer, and punished as such, L. 13. tit. 8. P. 1.<sup>46</sup> [L. 13. tit. 8. P. 7.] and L. 25. tit. 6. P. 1.<sup>47</sup>

*Felo de se.* The property which he leaves is applied to the use of the fisc if he has no descendants, L. 8. tit. 23. lib. 8. Rec.<sup>48</sup> [L. 15. tit. 21. lib. 12. Nov. Rec.]

A person committing homicide or wounding another with a hand gun (*alcabuz*), is traitorous (*alevoso*) and ought to forfeit all his property, one half to the king, and the other to the heirs of the deceased, L. 15. tit. 23. lib. 8. Rec. [L. 12. tit. 21. lib. 12. Nov. Rec.]

*Theft (hurto).* Its punishment is the restitution of the thing sto-

<sup>42</sup> *Palacios* says, that these laws are altered by a *pragmatica* of 19th September, 1788, (L. 11. t. 16. lib. 12. Nov. Rec.) accompanied by an instruction or declaration of forty-four sections (*capitulos*), directed first to extinguish by mild means, and proceeding afterwards progressively to the imposition of the penalty of death, to punish this race of persons, to speak more properly their mode of life, and make them useful citizens.

<sup>43</sup> L. 1. tit. 3. lib. 12. Nov. Rec., cited in the text, defines a heretic to be one who is baptised a Christian, and does not believe in the articles of the catholic faith, or any of them. *Palacios* observes, that in order to the incurring these penalties, it is necessary that the party be declared a heretic by the tribunal of the Inquisition, to which the cognisance and punishment of this offence belongs; as also of all those which directly offend against religion. The Inquisition is abolished by the 12th Article of the Constitution of the Spanish monarchy; and by the decree of the Cortes of the 22d February, 1815, L. 2. tit. 26. P. 7., is re-established in its pristine vigor; and the cognisance of such offences belongs to the bishops or their substitutes; but the imposition of the punishment or penalties to the secular judges.

<sup>44</sup> *Palacios* says, "the father loses by this barbarous act the right of *patria potestas*, according to L. 4. tit. 20. P. 4., revived and confirmed by *Royal Cedula* of 11th December, 1796, (L. 5. tit. 37. lib. 7. Nov. Rec.)." It may be added, that by L. 4. tit. 20. P. 4., if a slave be so abandoned by the owner, such slave becomes free.

<sup>45</sup> See all the laws cited in this part of the text.

<sup>46</sup> Read P. 7.

<sup>47</sup> No such law.

<sup>48</sup> *Palacios* says, without citing any authority for his dictum, that the punishment attached by this law to the commission of suicide is not in practice; because, it is presumed, that the person committed it through insanity: in which case, this punishment does not take place, according to L. 24. tit. 1. P. 7.; nor that of being dragged and burnt, as laid down in L. 19., tit. *fn. del ordenamiento*: nor that of dying excommunicated, and the punishments consequent thereon: *can. 9. and 12; caus. 23. quest. 5.* The validity of the practical infringement, or disregard of an express statutory enactment, may be very fairly questioned, without intending any disrespect to the opinion of the learned Professor.

len; and if it is private, it is punished with the restitution of double, stripes (*azotes*), public disgrace (*vergüenza*), condemnation to the mines, imprisonment (*presidio*), the gallows (*horca*), &c., according to the circumstances and the quality of the thief, L. 18. tit. 14. P. 7., and Ll. 7. and 9. tit. 11. lib. 8. Rec. [L. 18. tit. 14. P. 7. and Ll. 1. and 2. tit. 14. lib. 12. Nov. Rec.] He who commits theft, whether it be qualified or not, in the place or town in which the court resides (*corte*), or within five leagues of its environs, if he is seventeen years old, incurs the penalty of death, if above fifteen, that of 200 stripes, and ten years' condemnation to the galleys, one witness and two *indicios* being sufficient to prove the crime,<sup>49</sup> Auto 19. and 21. tit. 11. lib. 8. Rec. [Ll. 3. and 5. tit. 14. lib. 12. Nov. Rec.]

*Arson.* The person guilty of this offence (*incendiario*), besides the punishment of death according to L. 6. tit. 12. lib. 8. Rec. [L. 5. tit. 15. lib. 12. Nov. Rec.,] forfeits the half of his property to the *camara*, L. 8. tit. 26. lib. 8. Rec.<sup>50</sup> [L. 7. tit. 21. lib. 12. Nov. Rec.]

*Incest.* He who commits it, besides the punishment of adultery, L. 3. tit. 18. P. 7. [L. 3. tit. 18. P. 7.], is liable to that of the confiscation of half his property, L. 7. tit. 20. lib. 8. Rec. [L. 1. tit. 29. lib. 12. Nov. Rec.]

*Injury or libel (injuria).* He who injures or libels his father, is

\* *Palacios* says, the punishment of theft is pecuniary to satisfy the party or individual injured, and corporal to satisfy public vengeance. That the pecuniary punishment for manifest theft is, for the person committing it, to return the thing stolen, or its value, to him from whom it was stolen, and fourfold the value besides: for private theft, to return the thing stolen, or its value, and double the amount, L. 18. tit. 14. P. 7., although *Ant. Gomez*, 3. var. res. cap. 5. hath said, that at present, these penalties of two, and four-fold the amount, are not in use; and that the parties should be content to recover the thing stolen, with compensation for the damages and prejudices. This, observes the learned Professor, is not to say, that the law of the *Partida* (L. 18. tit. 14. P. 7.), cited in the text, ought not, in this respect, to be in full vigor and observance. That the public good is much interested in the severe punishment of thieves. The corporal punishment, proceeds the Professor, for the first simple theft, is public disgrace (*vergüenza*), and six years' condemnation to the galleys; and for the second, 100 stripes, and perpetual condemnation to the galleys, Ll. 7. and 9. tit. 11. lib. 8. Rec. (Ll. 1. and 2. tit. 14. lib. 12. Nov. Rec.): he refers also to his last note of this title, p. 256. *post.*: that for the third offence, some authors say the punishment of death ought to be inflicted; but that, although he, *Palacios*, is of opinion thieves ought to be punished with all the rigor of the law, he hath not found one law which expressly imposes this punishment; and therefore he does not subscribe to the opinion of these authors. That some qualified thefts are punished for the first time with death, as are highwaymen or footpads; persons guilty of burglary in, or breaking into (*quebrantadores*), churches, houses (*casas*), or other place. He refers to L. 18. tit. 14. P. 7. He adds, that simple theft, committed in the place or town where the court resided (*corte*), was punished with death; but that by a royal decree of 18th April, 1746, (see L. 6. tit. 14. lib. 12. Nov. Rec.), it was ordered, that simple thefts which should be committed within the place of residence of the court (*corte*), should be punished by arbitrary punishments; and that, although there are two royal decrees posterior to the above, which point out and determine the punishment, its execution seems to be suspended. He refers to the *Prontuario* of *Dr. Aguirre*, in a note on the word *robos*. See Ll. 3. and 5. tit. 14. lib. 12. Nov. Rec.; and 3d vol. *Gutierrez, Prac. Crim.*, p. 88. n. 19. to p. 98. n. 36. inclusive.

<sup>50</sup> *Palacios*, on this subject, in addition to the laws cited in the text, refers to L. 2. tit. 9. P. 1. and L. 10. tit. 15. P. 7.; the royal decree of 23d February, 1773, and the royal order of 19th April, 1775, neither of which are inserted in the Chronological Index of the Nov. Rec.



obliged to pay six hundred *maravedis*, four hundred to the injured party, and two hundred to the accuser; besides,<sup>51</sup> is liable to suffer twenty days' imprisonment,<sup>52</sup> L. 1. tit. 10. lib. 8. Rec. [L. 4. tit. 25. lib. 12. Nov. Rec.] He who libels another with stigmatising or in- [ 237 ] famous language<sup>53</sup> (*palabra denigrativa*), shall pay twelve hundred *maravedis*, and shall be obliged to recant (*desdecirse*), if he is not an *hidalgo*, L. 2. tit. 10. lib. 8. Rec. [L. 1. tit. 25. lib. 12. Nov. Rec.,] although in this particular the punishment is proportioned to the quality of the offence, L. 3. tit. 10. lib. 8. Rec.<sup>54</sup> [L. 2. tit. 25. lib. 12. Nov. Rec.]

*Gaming (juego).* He who plays at dice or cards in public,<sup>55</sup> or he who has a gaming table in his house, incurs the penalties set forth in Ll. 2, 3. 13. and 14. tit. 7. lib. 8. Rec. [Ll. 1, 2. 11. and 12. tit. 23.] unless something to eat immediately is played for, L. 5. tit. 7. lib. 8. Rec. [L. 4. tit. 23. lib. 12. Nov. Rec.] Artificers or workmen (*oficiales*), and day laborers (*jornaleros*), are prohibited from playing on work days, Ll. 14. and 16. tit. 7. lib. 8. Rec.<sup>56</sup> [L. 12. tit. 23. lib. 12. Nov. Rec.]

*Common swearer (jurador)* ought to be imprisoned a month for the first offence; for the second, banished for six months,<sup>57</sup> and for the

<sup>51</sup> Read or see L. 4. tit. 25. lib. 12. Nov. Rec., cited.

<sup>52</sup> In addition to the punishment prescribed by Ll. 1. 6. 20. and 21. tit. 9. P. 7., and L. 4. tit. 6. P. 7.: see note (a), L. 4. tit. 25. lib. 12. Nov. Rec., cited in the text.

<sup>53</sup> As calling a man a sodomite, cuckold, traitor, a heretic, or a married woman a whore, &c.: it would seem that the punishment of this law does not extend to the calling a widow whore. See *Azevedo*, on L. 2. tit. 10. lib. 8. Rec. n. 43.: and *Partidoris* on ditto, n. 50. cap. 17. lib. 1. p. 55.

<sup>54</sup> This law relates to libellous words of a less gross character than those mentioned in L. 1. tit. 25. lib. 12. Nov. Rec.; for which the punishment is payment of two hundred *maravedis*, and the judge is authorised to impose a greater punishment according to the quality of the persons, and of the injury or libel. See the law cited. *Palacios* adds, that he who libels any foundling (*exposito*), by calling him bastard, &c., besides being compelled to retract in court or judicially his injurious assertion, ought to suffer a proportionate pecuniary punishment, royal decree, 20th January, 1794, (not inserted in the Chronological Index of Nov. Rec.) That he who libels another by written defamatory libel (*libelos infamatorios*), incurs the same punishment that the person libelled would incur, if what is imputed to him should be proved, L. 3. tit. 9. P. 7., and that in case the libel is in writing, the libeller is not exempted from the punishment, although the libellous matter be true. That if the libel should be verbal, or slander, and the person uttering the slanderous or libellous words should wish to prove the truth of what he said, he will be admitted to proof thereof, provided the public be interested in its being known; and in such case he will not be liable to the punishment; but if the public is not interested therein, he is not admitted to such proof, and consequently incurs the punishment, although the slander be true, because no one has a right to insult another; and it is always unjust and injurious to reproach others with their defects or faults, however true they may be. That in this sense, L. 1. tit. 9. P. 7. must be understood, and he refers to *Greg. Lop. Gl. 7.* on this law. He concludes by observing that the action for libel (*injuria*), can only be instituted within a year, for after a year hath expired, it is understood that the libel or injury is forgiven, or it is presumed the party did not consider himself dishonored, L. 22. tit. 9. P. 7. The action is also barred if the party libelled should afterwards eat in company, or associate with the libeller. See L. 22. tit. 9. P. 7., referred to by the professor.

<sup>55</sup> Or in private. See Ll. 1. and 12. tit. 23. lib. 12. Nov. Rec.

<sup>56</sup> Gaming is severely punished by the laws cited in the text. See them, and also L. 15. and the other laws of tit. 23. lib. 12. Nov. Rec. on the subject.

<sup>57</sup> And to pay one thousand *maravedis*. See L. 4. tit. 5. lib. 12. Nov. Rec.

third, have his tongue nailed (*se le enclava la lengua*) if he is a plebeian; and if he should be a person of condition, the banishment shall be doubled,<sup>58</sup> L. 5. and 6. tit. 4. lib. 8. Rec. [L. 4. and 6. tit. 5. lib. 12. Nov. Rec.]

**Masks.** Plebeians are prohibited to walk with masks under pain of one hundred stripes; and nobles under pain of banishment or transportation for six months; and it being in the night time, the punishment is doubled,<sup>59</sup> L. 7. tit. 15. lib. 8. Rec. [L. 1. tit. 13. lib. 12. Nov. Rec.]

**Clandestine marriage** draws down the punishment of forfeiture of property and perpetual transportation from His Majesty's dominions,<sup>60</sup> L. 1. tit. 1. lib. 5. Rec. [L. 5. tit. 2. lib. 10. Nov. Rec.]

**Beggars** who can work may be driven out of the place, and receive fifty stripes, L. 2. tit. 11. lib. 8. Rec. [L. 2. tit. 31. lib. 12. Nov. Rec.]

**Landmarks (mojones);** he who alters them, or confounds the boundaries or limits of towns (*terminos*), incurs a penalty of fifty *maravedis* of gold for each boundary mark, and loses any right which may result to him from it,<sup>61</sup> L. 30. tit. 14. P. 7. [L. 30. tit. 14. P. 7.] and L. 6. tit. 6. lib. 3. Rec. [L. 12. tit. 21. lib. 7. Nov. Rec.]

**Prostitutes (mugeres publicas)** shall not have female servants under forty years of age, under pain of transportation for a year, and a fine of 2000 *maravedis*, L. 7. tit. 19. lib. 8. Rec. [L. 6. tit. 26. lib. 12. Nov. Rec.]; and there shall be no brothels (*casas publicas de ellas*), L. 8. tit. 19. lib. 8. Rec.<sup>62</sup> [L. 7. tit. 26. lib. 12. Nov. Rec.]

**Lewd or obscene expressions (palabras deshonestas).** He who utters them, pays two hundred *maravedis*, L. 3. tit. 10. lib. 8. Rec. [L. 2. tit. 25. lib. 12. Nov. Rec.]; and no one may sing them under pain of banishment<sup>63</sup> for a year, and punishment of one hundred stripes,<sup>64</sup> L. 5. tit. 10. lib. 8. Rec. [L. 6. tit. 25. lib. 12. Nov. Rec.]

<sup>58</sup> Also the pecuniary penalty. See L. 4. tit. 5. lib. 12. Nov. Rec. cited.

<sup>59</sup> *Palacios* says, that masks are prohibited by decrees (*bandos*) of 1767, 1773, and 1775, and the person masking (*desfrax*), is punished with thirty days' imprisonment in the common gaol (*de carcel*), the noble with four years' confinement (*de presidio*), and the plebeian to labor in the dock yard (*de astillero*). That the person who is proved to have danced, or been in any house with a mask or disguise, incurs also a fine of a thousand ducats.

<sup>60</sup> Under pain of death if they should return; and the parents may disinherit their children contracting such marriage. See L. 5. tit. 2. lib. 10. Nov. Rec. cited.

<sup>61</sup> He who changes landmarks loses the right which he might have to the land on which he placed them, and if he had no right therein, he shall restore to the proprietor the land so surreptitiously sought to be gained by him, with an equal quantity of his own land. See L. 30. tit. 14. P. 7. cited in the text.

<sup>62</sup> See also L. 8. and Auto 1. tit. 26. lib. 12. Nov. Rec.

<sup>63</sup> From the town or place where convicted of the offence.

<sup>64</sup> See L. 10. tit. 25. lib. 12. Nov. Rec., which punishes men guilty of using obscene language, or performing indecent actions, with a month's labor in the public works, and women for the like period in the establishment of San Fernando for the first offence; and it increases the punishment for a second and third commission thereof.

*A Parricide*<sup>65</sup> is punishable with death, for at present the ancient punishments prescribed by L. 12. tit. 8. P. 7.<sup>66</sup> [L. 12. tit. 18. P. 7.] are obsolete.<sup>67</sup>

*Feigned Parturition (parto fingido).* The woman who feigns it<sup>68</sup> must be transported, Ll. 3. and 6. tit. 7. P. 7. [Ll. 3. and 6. tit. 7. P. 7.]

*Perjury.* The property of a person guilty of perjury is confiscated, L. 1. tit. 17. lib. 8 Rec.; [L. 2. tit. 6. lib. 12. Nov. Rec.] and being one of the parties to the suit, he loses the cause, L. 3. tit. 12. lib. 4. *Fuero Real*.<sup>69</sup>

*Detestable crime (pecado nefundo).* The person guilty of it must be burnt, and his property confiscated,<sup>70</sup> L. 1. tit. 21. lib. 8. Rec. [L. 1. tit. 30. lib. 12. Nov. Rec.]

*Plagiarios* are those who steal or kidnap men to sell them in an enemy's country. The noble who is guilty thereof is imprisoned (*va á presidio*);<sup>71</sup> and the offender not being a noble, incurs the punishment of death, L. 22. tit. 14. P. 7.<sup>72</sup> [L. 22. tit. 14. P. 7.]

*A person guilty of an escape from, or breaking of prison,* is liable to a punishment of two hundred stripes, or public disgrace (*vergüenza publica*), and to a fine of six hundred *maravedis* to the king; besides, to be taken as confessed with respect to the crime for which

<sup>65</sup> This extends to other relations and persons, besides parents. See L. 12. tit. 8. P. 7. The bare purchase of and endeavor to administer poison by a child to a parent, although it should not be effected, is punishable with death; and if any other child should be cognisant thereof, and should not advise the parent, such child is punishable with five years' transportation by L. 12. tit. 8. P. 7.

<sup>66</sup> These punishments are to be publicly whipped, then to be sewn up in a leathern bag, with a dog, a cock, a serpent, and an ape, and thrown into the sea, or nearest river. See L. 12. tit. 8. P. 7.

<sup>67</sup> *Palacios* observes, that *Posadilla* in his *Prac. Crim.* tom. 3., says, these punishments are in some manner executed by covering the dead body of the parricide with leather, on which the animals mentioned in the preceding note are painted.

<sup>68</sup> To impose a false, or other person's child upon her husband. See L. 3. tit. 7. P. 7. cited in the text.

<sup>69</sup> *Palacios* observes, that "the person who may break, or not keep his oath in any contract he hath made, shall forfeit all his property to the crown (*camara*), is said by L. 2. tit. 6. lib. 12. Nov. Rec.; but that in practice he is compelled to fulfil it, and it is not seen that the said penalty is imposed. He adds, that he who on oath gives false testimony, shall pay the demand to him who lost it by such testimony; that his evidence shall be no more valid, and that his teeth shall be taken out, and that this is what is stated in L. 3. tit. 12. lib. 4. *Fuero Real*. See *False Witness*, p. 247, ante.

<sup>70</sup> And it is not necessary that the perfection or consummation of the crime should be proved, but the proof of acts approaching to, or very near its conclusion, will be sufficient to produce the punishment mentioned in the text. See L. 1. tit. 30. lib. 12. Nov. Rec. cited.

<sup>71</sup> The punishment by L. 22. tit. 14. P. 7., for an *hidalgo* guilty of this offence, is being cast into irons, and condemned for life to work on the works of the crown.

<sup>72</sup> *Plagium*, or man stealing, is the knowingly selling, purchasing or concealing a free man, or another man's slave, or otherwise depriving a man of his slave. Also the knowingly receiving a free man, with the intention to make use of him as a slave. See L. 22. tit. 14. P. 7., and *Greg. Lop. Gl.* 1., thereon; *Wood, Civ. Law*, p. 285, ch. 10. Book 3., (which see, as also p. 285. *ibid.*) says, that it is *plagium* where a slave is persuaded to run away from his master, or when he is concealed after he hath run away from him.

he is imprisoned,<sup>73</sup> L. 13. tit. 29. P. 7. and L. 7. tit. 26. lib. 8. Rec. [L. 13. tit. 29. P. 7. and L. 17. tit. 38. lib. 12. Nov. Rec.]

*Regraters* who obstruct the supplying of the town with provisions (*que estorban los abastos*) must be punished with stripes and fines (*multas*),<sup>74</sup> Ll. 1, 2, and 6. tit. 14. lib. 5. Rec. [Ll. 6, 7 and 8, tit. 17. lib. 3. Nov. Rec.]

*Apostates* (*renegados*), whom our laws call turn-coats (*tornadizos*), are liable to the same punishment as heretics; *vide tit. Heretics*, p. 248.

*Resistance to justice.* The person who makes, it, is punishable with eight years' condemnation to the galleys,<sup>75</sup> L. 7. tit. 22. lib. 8. Rec.; [L. 6. tit. 10. lib. 12. Nov. Rec.] and according to Ll. 1, 2, 3, and 4, tit. 22. lib. 8. Rec, [Ll. 1, 2, 3, and 4, tit. 10. lib. 12. Nov. Rec.,] those who oppose the *alcaldes de corte* are liable to the penalty of death, and confiscation of property; and if they should kill any of the ordinary justices of the towns, they ought to suffer death, and forfeit half of their property; and if they should only wound them, they shall forfeit half of their property, and be transported for ten years from the kingdom, L. 5. tit. 22. lib. 8. Rec.<sup>76</sup> [L. 5. tit. 10. lib. 12. Nov. Rec.]

*Raffles and games of chance*, even under pretence of devotion, are prohibited, under the penalty of forfeiture of the things [ 239 ] raffled for; and, besides, the price put down or paid to raffle, with as much more on the part of those who put it down or pay it, L. 12 and *Auto* 1. tit. 7. lib. 8. Rec.<sup>77</sup> [Ll. 1 and 2. tit. 24. lib. 12. Nov. Rec.]

*Robbery.*<sup>78</sup> He who robs on the high roads (*en caminos*); besides the punishments ordained by the common law (*segun derecho*), is obliged to pay six thousand *maravedis* to the *camara*, L. 1. tit. 12.

<sup>73</sup> And the gaoler, or person having him in custody by L. 17. tit. 38. lib. 12. Nov. Rec., must answer in his stead, and pay a fine to the crown (*camara*) of six hundred *maravedis*. *Palacios* observes on this part of the text, that by a royal order of 27th January, 1787, (nota 2. tit. 40. lib. 12. Nov. Rec.), a person guilty of the offence of breaking prison, is sent or condemned to the galleys, if the crime for which he was imprisoned should not require a greater punishment, and it should be proved. That from this it is inferred, that from the mere circumstance of breaking prison, he ought not to be taken, or had as having confessed the crime, for although when by the laws cited he was so held (and he was not always so held, as *Azedo*, on L. 27. tit. 6. lib. 8. Rec. explains,) this presumed confession did not exclude the proof which the breaker or person guilty of the escape might give of his innocence, for presumptive proof ought to yield to positive proof. That the laws cited in the text do not make mention of the punishment of two hundred stripes; nor of that of public disgrace. That law 13. tit. 39. Part 7., leaves the punishment to the discretion of the judge.

<sup>74</sup> *Regraters*, observes *Palacios*, it is seen, are punished with fines (*multas*), but not with stripes. That by the royal order of the 29th April, 1804, the use of the iron ring (*argolla*) was directed to be re-established in Madrid for regraters of all classes.

<sup>75</sup> And disgrace (*vergüenza*). The punishment may be greater, according to the nature of the resistance, &c. See L. 6. tit. 10. lib. 12. Nov. Rec.

<sup>76</sup> See the laws of the 10th title, 12th book, *Nov. Rec.*, cited in the text: also the royal decree of 2d April, 1783, (not in *Nov. Rec.*)

<sup>77</sup> See also L. 3. tit. 24. lib. 12. Nov. Rec.; and title Gaming, p. 250. *ante*.

<sup>78</sup> See title Theft, and note (<sup>49</sup>) p. 249. *ante*.

lib. 8. Rec. [L. 3. tit. 15. lib. 12. Nov. Rec.] Every robber in a desert or uninhabited place, of the value of one hundred and fifty *maravedis*, is punishable with transportation and stripes; with the addition, that the robber must pay to the party double the amount of the property robbed. If the robbery should amount to five hundred *maravedis*, the robber is punished with stripes and the cutting off his ears; if it exceeds five hundred *maravedis*, up to a thousand, with the cutting off his foot, and with never being allowed to ride on horse or mule back; and if it exceeds five thousand *maravedis*, he ought to suffer death for it, L. 3. tit. 13. lib. 8. Rec.<sup>79</sup> At the present time, highway robbers incur the penalty of death.<sup>80</sup> He who steals any slave, or the child of another, must suffer death, if he is a plebeian; and if an *hidalgo*, be condemned for life to hard labor,<sup>81</sup> L. 22. tit. 14. P. 7. [L. 22. tit. 14. P. 7.] Stealers of cattle by use and habit, deserve the punishment of death; and when the robbery is confined to one or two heads, it is punished with imprisonment (*presidio*), condemnation to the mines, &c., according to the crime and its circumstances, L. 19. tit. 14. P. 7. [L. 19. tit. 14. P. 7.]

*Sacrilege* is punishable by excommunication, and other penalties according to L. 4. and other laws, tit. 18. P. 1.<sup>82</sup> [L. 4. &c. tit. 18. P. 1.]

*Breaking open graves* (*sepultura quebrantador*). Persons guilty of this offence are punished arbitrarily, or they are condemned to imprisonment (*á presidio*) according to the circumstances of the breaking open: and if effected by arms, and the ill treating the dead bodies, it is punishable with death, L. 12. tit. 9. P. 7.<sup>83</sup> [L. 12. tit. 9. P. 7.]

*Simony*.<sup>84</sup> He who is guilty of the offence, forfeits the gift (*gracia*) which he may have obtained, and besides double the amount of what

<sup>79</sup> This law is not inserted in the *Nov. Rec.*

[<sup>80</sup> *Palacios* says, that the laws of the *Partida* make a difference between robbery (*robo*), and theft (*hurto*); giving the name of *robo* to what the Romans called *rapina*, L. 1. tit. 13. P. 7., which implies theft in which force intervenes *Princip*; tit. 12. P. 7., but that as these words are commonly taken as synonymous, the word *hurto* may be referred to. See p. 249, *ante*, and note <sup>49</sup> *ibid*. That, notwithstanding it is there said, that the pecuniary punishment of theft (*hurto*), not manifest, is the payment of the double of the amount or value stolen; and that of manifest theft, fourfold the amount: and the penalty of threefold the amount having been affixed by L. 3. tit. 13. P. 7., and L. 2. tit. 12. lib. 8. Rec. (L. 4. tit. 34. lib. 12. Nov. Rec.), to the offence of robbery or rapine, it is convenient, in order to avoid confusion, to add here the motive for this difference. The learned Professor goes on to observe, that the laws of Spain in this particular, (he might have added in most others), were taken from those of the Romans; and the Roman prætors established the penalty of threefold the amount with respect to robbery; not because that in robbery the same actions are not given as in theft—for, as the Emperor Justinian says, § *init. Inst. de vi ben. rap.*, he who commits robbery is an infamous thief, and is subject to the same actions as he who commits theft; but in order to prove their zeal, and in detestation of this crime.

<sup>81</sup> See title *Plagiarios*, and note <sup>72</sup>, p. 252. *ante*.

<sup>82</sup> *Sacrilege*, says *Palacios*, is an offence *mixti fori*, the penalties of excommunication, and the other ecclesiastical penalties being of ecclesiastical cognisance.

<sup>83</sup> See this law: the relations of the deceased person may proceed civilly if they prefer it, and recover from the offender 100 *maravedis* of gold.

<sup>84</sup> This, says *Palacios*, belongs to the canonists, and its cognisance to the ecclesiastical jurisdiction.

he may have given or promised, and must be transported from the kingdom for ten years, L. 19. tit. 26. lib. 8. Rec. [L. 3. tit. 22. lib. 3. Nov. Rec.] *Suborners*, are punishable with transportation, Ll. 5. and 6. tit. 9. lib. 3. Rec.<sup>85</sup> [Ll. 7. and 8. tit. 1. lib. 11. Nov. Rec.]

*Highwaymen (salteadores)*. See title Robbery.

*Treason or traitor (traidor)*. The punishment of death [240] and confiscation of property is inflicted upon persons guilty of this crime, L. 2. tit. 18. lib. 8. Rec. [L. 2. tit. 7. lib. 12. Nov. Rec.] He loses his privileges of nobility or rank (*hidalguia*), and his houses are rased to the ground to serve as a mark of perpetual infamy, L. 1. tit. 12. lib. 8. Rec. [L. 3. tit. 15. lib. 12. Nov. Rec.]; and he who knowingly admits into his house<sup>86</sup> or gives an asylum<sup>87</sup> (*acoge*) to traitors forfeits half his property, L. 4. tit. 18. lib. 8. Rec.<sup>88</sup> [L. 3. tit. 7. lib. 12. Nov. Rec.]

*Vagabonds*. Under this name are comprehended all sturdy or healthy beggars, L. 11. tit. 11. lib. 8. Rec. [L. 5. tit. 31. lib. 12. Nov. Rec.] They are punished for the first time with four years condemnation to the galleys, for the second with one hundred stripes and eight years' condemnation to the galleys; and for the third with one hundred stripes and perpetual condemnation to the galleys, L. 6. tit. 11. lib. 8. Rec.<sup>89</sup> [L. 4. tit. 31. lib. 12. Nov. Rec.]

*Outlaws or banditti (bandidos)*. If being cited or called by edicts and proclamations (*pregones*) they do not appear they are considered as contumacious, and any person may kill them, and being once taken they must be drawn, hanged, and quartered, and their property confiscated, *Auto* 3. tit. 11. lib. 8. Rec.<sup>90</sup> [L. 1. tit. 17. lib. 12. Nov. Rec.]

*Usurer*. The contracts made by such person are null, he forfeits or loses that which he lends on usury, and he pays as much more (*otro tanto*). Being a second time guilty of the offence, he forfeits the half of his property; and the third time he forfeits the whole,<sup>91</sup> Ll. 4. and 5. tit. 6. lib. 8. Rec. [Ll. 2. and 4. tit. 22. lib. 12. Nov. Rec.]

<sup>85</sup> The laws cited by the text, says *Palacios*, only treat of judges, who receive gifts from the suitors, punishing them for this crime with privation of, or degradation from office: and he refers to cap. 9. *Instruc. de Corregidores* on this subject.

<sup>86</sup> This Law 3. tit. 15. lib. 12. Nov. Rec.; which is L. I. tit. 12. lib. 8. Rec., cited in the text, does not apply.

<sup>87</sup> For three days, says L. 3. tit. 7. lib. 12. Nov. Rec., cited in the text.

<sup>88</sup> *Palacios* refers to the whole of tit. 13. P. 2., particularly to L. 6. thereof.

<sup>89</sup> *Palacios* says, that all the royal orders respecting the assemblage (*recojimiente*) of vagrants, remained without force by cap. 41. of the *Royal Cedula*, or enactment respecting the press, of 7th May, 1775. (See L. 7. tit. 31. lib. 12. Nov. Rec.,) which is that which governs with regard to vagrants, &c.

<sup>90</sup> *Vide* the quotation.

<sup>91</sup> *Palacios* says, that the contracts made by a usurer are null, and do not carry prompt execution; but that this, it is stated by *Febrero Reformado*, p. 1. cap. 16. §. 1. n. 30., is only observed with respect to the interest; for that with respect to the principal execution goes against the debtor, notwithstanding what the two laws cited in the text lay down. With

## NOTE.

¶ By the ordinance (*pragmatica*) of 12th March 1771<sup>92</sup> it is established, That persons guilty (*delinquentes*) of qualified crimes such as those who in transgressing the laws commit crimes (*delinquen*) with a depraved and wicked mind, are punishable with imprisonment in Africa (*de presidio de Africa*); and that those guilty of crimes not qualified (that is committed without such wicked mind or intention) are sent to the dock yards of Cadiz, Ferrol, and Carthage, under the dispositions therein directed<sup>93</sup> whereby also the extension which was improperly given to [L. 8. tit. 11. lib. 8. Rec. [L. 2. tit. 40. lib. 12. Nov. Rec.]] and of those laws corresponding with it is done away.

great deference to the learned professor, and the compiler whom he has quoted, it would be going too far to set up the authority of even *Febrero*, against positive statutory enactments.

<sup>92</sup> L. 7. tit. 40. lib. 12. Nov. Rec.

<sup>93</sup> *Palacios* observes, that the contrary of what is stated in the text, is laid down in the *Pragmatica* of 12th March, 1771, (L. 7. tit. 40. lib. 12. Nov. Rec.), that is, that the last mentioned punishment, which cannot exceed ten years, is awarded to the first class of crimes, and the first to the last: he transcribes a great part of this law (which see), and asserts, that notwithstanding its definite terms, and its severity, practice, as is stated in the text at the beginning of this title, hath altered and mitigated the punishments of many crimes. That at present, and by a royal order of 30th December, 1803, no one ought to be sentenced or condemned to the galies, they not being found in a state to be useful, and therefore that some other equivalent punishment should be imposed, when, according to the laws, any offender should deserve it. He also refers to the instruction (16th July), of 1803 (L. 21. tit. 41. lib. 12. Nov. Rec.), which ordered (el. 5.), as an addition to that issued on 27th December, 1748. (L. 17. tit. 41. lib. 12. Nov. Rec.), "that opulent persons should be punished by pecuniary fines in lieu of corporal punishments, of imprisonment (*de carcel*), and others of a like nature for light offences; and that the superior tribunals should also be able to commute the punishments of imprisonment (*de presidio*), where the class or description of offence should permit it, &c. That by cedula of 28th March, 1786 (L. 15. tit. 40. lib. 12. Nov. Rec.), which refers to former ones (*Pragmat.* 12th March, 1771. cap. 5. or L. 7. tit. 40. lib. 12. Nov. Rec.), it is ordered that no offender shall be sentenced for life to imprisonment (*de presidio*), nor to confinement for an indefinite period in a house of correction, in order to prevent the desperation of offenders and other disadvantages; or evils. That some royal orders fix ten years for the greater punishment, and others, especially that of 17th February, 1786 (not in *Nov. Rec.*), direct that those which appoint ten years, are understood to apply to only one sentence or conviction, and without prejudice to a fresh charge for new crimes. That ten years with the order of confinement (*clausula de retencion*), is the utmost period to which condemnations of imprisonment (*de presidio*) can be extended. Royal cedula, 7th October, 1796 (L. 16. tit. 12. lib. 5. Nov. Rec.). That as regards the punishment of mutilation of limb, it hath ceased to be of use in Spain. That with respect to the ancient pecuniary punishments, it may be said that they have been made arbitrary in consideration of the great depreciation of money since the laws which imposed them were established, which would render them almost useless, if the letter of the law should be observed. And that the instruction for *corregidores* of 1788 (see L. 25. tit. 28. lib. 12. Nov. Rec.), will be of use, in order to proceed with certainty in regard to some criminal points.

For more full information on the subject of this title of the text, the reader is referred to the 7th Partida, Book 12, of the *Novisima Recopilacion de las Leyes de España*, to *Antonio Gomez*, and to *Mathæus de delictis*, and to the practical criminal works of *Vilanova* and *Gutierrez*.

## BOOK III.

## OF ACTIONS.

## TITLE I.

OF JURISDICTION, JUDGES AND TRIALS, OR JUDICIAL PROCEEDINGS  
IN SPAIN IN GENERAL.

CAP. 1. HAVING treated of the two first objects of justice, [ 241 ] it remains to discuss, in this third book, the last, which relates to actions, under which term is understood all that is embraced or comprised in a trial or judicial proceeding (*juicio*); therefore we shall treat in succession of each of its parts.

Jurisdiction<sup>1</sup> is the power which the king or lord of a domain possesses over his subjects or vassals as arising from the dominion which he exercises over them. This dominion (*imperium*) is pure (*mero*) and mixed. Pure dominion or jurisdiction is that which confers upon the prince the power of deciding criminal causes. Mixed is that which confers upon him the cognisance of civil causes, L. 18. tit. 4. P. 3. [L. 18. tit. 4. P. 3.] Thus then this supreme jurisdiction in matters civil and criminal resides only in the king, L. 1. tit. 1. lib. 4. Rec. [L. 1. tit. 1. lib. 4. Nov. Rec.]; and, therefore no lord or private individual can exercise in the dominions of the crown this jurisdiction without producing the title or privilege he possesses for so doing, L. 2. tit. 1. lib. 4. Rec. [L. 2. tit. 1. lib. 4. Nov. Rec.] Whence proceeds the pre-eminence or right of the crown to appoint secular judges to the cognisance of these two kinds of causes, as also escribanos and other ministers of justice, L. 2. tit. 4. P. 3. [L. 2. tit. 4. P. 3.]

CAP. 2. Jurisdiction in the first place is ordinary or delegated. Ordinary is, that which is vested with every extension in the [ 242 ] magistrate by reason or virtue of his office. Delegated is that which is given to any one for the cognisance of a certain and determinate cause, which is exercised by all judges who are commissioned or deputed (*comisionados*).

From the different nature of these two jurisdictions we deduce, that the ordinary is favorable and perpetual, and the delegated odious and limited. 1st, Wherefore if a commission is given to an ordinary judge to take cognisance of any cause, over which he possessed ordinary jurisdiction, he is understood to exercise the latter,

<sup>1</sup> See Wood's Civ. Law, book 4. ch. 1. p. 292.



unless something be added to, or taken from it, but even in this last case, if he hath not made use of the limitation or extension, he will be always considered to have exercised the ordinary. *Hevia, Cur. Filip.* part. 1. § 4. num. 4. and 5. 2d, That both jurisdictions concurring in one judge, he is understood to exercise the ordinary, *Hevia, ibid.* num. 5.

As in delegation oftentimes regard is had to the ability or fitness which the substitute shows for the office which he is to exercise, it hence follows, 1st, That the appointment can only pass to his successor when the substitute or delegate is not named; or being named if it can be proved that the person delegating was unacquainted with the delegate at the time he commissioned him, *Hevia, ibid.* num. 12. 2d, That the delegate cannot commit his jurisdiction to another judge although he be an ordinary one, L. 47. tit. 18. P. 3. [L. 47. tit. 18. P. 3.]

Cap. 3. In the second place, jurisdiction is divided into privative or exclusive (*privativa*), and preventive (*acumulativa*). The first is that which of itself alone deprives other judges of, or excludes them from, the cognisance of the cause; and this all judges enjoy or exercise to whom causes are committed with an inhibition to others of the district to take cognisance of them. The second is that by which a judge may have cognisance of causes which another judge undertakes, or in which he has concurrent jurisdiction, with *prevention*<sup>2</sup> between them, L. 19. tit. 8. lib. 2. Rec. [L. 9. tit. 14. lib. 5. Nov. Rec.] The latter, those enjoy, 1st, Who acquire it by favor of the person while living. 2d, Those who acquire it by prescription. 3d, Those who possess jurisdiction delegated to them by a judge superior to the one of the district or place; by reason or virtue of which they may inhibit the ordinary and other judges from the cognisance of causes contained in their commission, although they [ 243 ] may be pending before such judges; and in the mean time, if this commissioned judge dies, or his office or power is defective or at an end, they cannot even take cognisance of such causes without a new power or delegation from the person who appointed (*el delegante*), L. 47. tit. 18. P. 3. *Hevia, ibid.* n. 14. and 15.<sup>3</sup> [L. 47. tit. 18. P. 3.]

Cap. 4. In the third place jurisdiction is divided into necessary and voluntary. Necessary is that which is actually exercised over persons who are subject to it. Voluntary is that which is possessed over him who, of his own accord or free will, is disposed to submit to it, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]

From this last arises the jurisdiction called *prorogada* which is the

<sup>2</sup> This right of prevention of *Jurisdiccion acumulativa*, may be better defined. It consisted in this, that where two judges had concurrent jurisdiction over causes of the same nature, he before whom a cause was first instituted, and by whom the party was lawfully cited, acquired exclusive jurisdiction over that cause to conclusion. *Vide Instruc. Jurid. de Colom.*, 2d vol. lib. 1. cap. 1. p. 40. n. 10; and L. 12. tit. 7. P. 3.

<sup>3</sup> And L. 5. tit. 34. lib. 12. Nov. Rec., *et fin.*

extension of jurisdiction to the case or person to which or whom it is not by its nature extended. *Carleval*, tit. 1. disp. 2. sect. 1. q. 8. L. 20. tit. 21. lib. 4. Rec.<sup>4</sup> [L. 7. tit. 29. lib. 11. Nov. Rec.]

Hence it is, that in order to be bound by an incompetent jurisdiction (*prorogarse la jurisdiccion*), two things are necessary. The first, consent of the parties; the second, that the judge to whom submission is made, has antecedently lawful jurisdiction, *Carleval*, *ibid.* num. 979. and 1071.

The first requisite arises from tacit, or express consent, whence springs jurisdiction *prorogada*, tacit or express. Tacit jurisdiction *prorogada* takes place when those who contract or commit a crime subject themselves to a foreign or other (*ageno*) judge, who has cognisance of any of these proceedings in another jurisdiction, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]; or when one appears before a judge to whose jurisdiction he is not amenable, without pleading to it, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.] *Carleval*, *ibid.* sect. 2. num. 892. to 1000.; but contumacy, as it is compulsory, or not voluntary, does not induce or infer submission (*prorogacion*), *Carleval*, *ibid.* num. 1000. *et seq.* Jurisdiction *prorogada* express is, when one submits to the jurisdiction of another judge, renouncing his own privilege or right; *Carleval*, 1. *ibid.* sect. 1. num. 976. and sect. 2. num. 1003. to 1019. where may be seen the cases in which this express consent is not valid; neither does this jurisdiction take place when the defendant files a cross bill by way of compensation, or set-off against the plaintiff before the same judge before whom he is sued or cited. The reason of this submission (*prorogacion*) is founded on this principle; that it [244] is proper that after the plaintiff hath desired to establish or obtain his right before a judge, the defendant should be allowed to do the like before the same judge, L. 20. tit. 4. P. 3. [L. 20. tit. 4. P. 3.]

From the second requisite follows; 1st, That every superior judge may submit to the jurisdiction of an inferior ordinary judge, L. 7. tit. 9. P. 1. [L. 7. tit. 9. P. 1.] 2d, That so also may the judge of equal jurisdiction submit to that of his equal, *Hevia*, *ibid.* num. 23. 3d, That the jurisdiction of every ordinary judge appointed for one or three years, although the term be expired, is submitted to until his successor enters on the possession of the office, L. 5. tit. 5. lib. 2. Rec. [L. 2. tit. 11. lib. 5. Nov. Rec.] 4th, That all jurisdiction, although necessary or compulsory (*forzosa*), may be exercised in another territory with permission of the judge of that district, *Hevia*, *ibid.* num. 25.<sup>5</sup> 5th, That the prince, lord, or judge, being absent from their territory or jurisdiction, may appoint a person to preside or decide in their name; but having two or more separate seignories or jurisdictions, and being in one of them, they may take cognisance of causes

<sup>4</sup> The definition of *Salv. Illus. del Derecho R. de Esp.* 2d vol. book 3. tit. 2. p. 149. n. 23, seems more clear, which is the submitting oneself to an incompetent jurisdiction; and he adds, that it is very rare, and of little use. *Vide also ibid.*, p. 146. *ante*, no. 18.

<sup>5</sup> Who adds the requisite of the consent of the parties interested. *Vide also* L. 7. tit. 4. P. 3.

from the other, provided that the party be not obliged to go from his domicile, L. 13. tit. 7. P. 3.<sup>6</sup>

Hence it also follows, that all jurisdiction, from its nature, may be submitted to, unless that its constitution or a statute forbid it on another account, *Carleval, ibid.* sect. 4. By the law of the realm the following persons are prohibited from submitting themselves to an incompetent jurisdiction: 1st, Laymen to an ecclesiastical judge, Ll. 11. and 13. tit. 1. lib. 4. Rec. [L. 6. tit. 1. lib. 10. L. 8. tit. 1. lib. 4. Nov. Rec.] 2d, Persons under twenty-five years of age, without the authority of their curator, *Carleval, ibid.* n. 1130. 3d, Agriculturists (*labradores*), even in case of submitting themselves to the nearest royal corregidor, or to the head of the district, L. 25. cap. 4. tit. 21. lib. 4. Rec. [L. 15. tit. 31. lib. 11., L. 6. tit. 11. lib. 10. Nov. Rec.] 4th, Poor persons, *Carleval, ibid.* n. 1142. 5th, An attorney without special authority, *Carleval, ibid.* n. 1143. Jurisdiction by its constitution cannot be submitted to: 1st, In suits pending in the audiences, which cannot be invoked to the council, Ll. 10. and 23. tit. 5. lib. 2. Rec. [L. 8. tit. 1. L. 23. tit. 1. lib. 5. Nov. Rec.] 2d, In cases of the value of thirty thousand *maravedis*, the cognisance of which belongs to the councils or corporations of cities or towns; *Pragmatica of 28th June, 1619.* 3dly, In causes of appeal: because no appeal can be preferred but to the immediate superior judge, *Carleval, ibid.* sect. 5. num. 1224.

[ 245 ] The effects of *prorogacion* are, 1st, That this jurisdiction passes to the successor in office, unless the submission hath been personal,<sup>7</sup> *Carleval, ibid.* sect. 6. n. 1234. and 1235. 2d, That being made to the judge delegate, it is at an end with the delegation, *Carleval, ibid.* n. 1236. 3d, That the sentence given by the judge to whose jurisdiction submission hath been made, may be carried into execution by him; unless the assistance of another jurisdiction be necessary, as happens in respect of the ecclesiastical judge, who cannot execute his sentences without the assistance of the secular power, Ll. 14 and 15. tit. 1. lib. 4. Rec. [Ll. 4. and 12. tit. 1. lib. 2. Nov. Rec.] 4th. That when once the submission is admitted by the judge he cannot be compelled to the cognisance of the cause, *Carleval, ibid.* n. 1240. 5th, That the judge may delegate this jurisdiction which has been submitted to, *Carleval, ibid.* n. 1241.

Cap. 5. From the royal and ecclesiastical jurisdiction emanate other subordinate or inferior ones, known under the name of *fueros privilegiados*, such are the military jurisdiction, those of the universities, and of the inquisition, &c., but such as can in no way prejudice or affect the civil or royal, from whence they have derived their existence. For the conservation of this jurisdiction, reference is had to the following provisions, 1st, That no ecclesiastical jurisdiction can impede the royal under pain of losing its privileges (*su naturaleza*),

<sup>6</sup> The law quoted does not apply. See L. 17. tit. 4. Part. 3.

<sup>7</sup> That is, to the judge personally.

and its temporalities (*temporalidades*), L. 3 and 4. tit. 1. lib. 4. Rec. [L. 3. and 4. tit. 1. lib. 4. Nov. Rec.], jointly with L. 12. tit. 8. lib. 1. Rec.;<sup>8</sup> which comprises the penalty of judges (*conservadores*) who intermeddle in profane or lay causes. 2d, That only in causes relating to benefices, tithes, and in criminal and matrimonial causes can ecclesiastical judges cite laymen in the tribunal or jurisdiction (*cabeza*) of the bishops, L. 5. tit. 1. lib. 4. Rec. [L. 5. tit. 1. lib. 2. Nov. Rec.] 3d, That ecclesiastics, who possess temporal jurisdiction, must exercise it through laymen, L. 8. tit. 3. lib. 1. Rec. [L. 10. tit. 1. lib. 2. Nov. Rec.] 4th, That the *corregidores* and justices must make their report every year, if the ecclesiastical judges usurp the royal jurisdiction, L. 17. tit. 5. lib. 3. Rec. [L. 1. tit. 15. lib. 2. Nov. Rec.] 5th, That special commissions may not be given in prejudice of the ordinary jurisdiction, except when it shall seem fit to the council, L. 10. tit. 9. lib. 3. Rec.<sup>9</sup> [L. 1. tit. 10. lib. 4. Nov. Rec.]

Cap. 6. These jurisdictions are given and appropriated by the king to magistrates who judge in his name. Therefore they are called judges, which implies good men who are appointed to order and to administer justice, L. 1. tit. 4. P. 3. [L. 1. tit. 4. P. 5.] Hence [246] it is, that every judge ought to be qualified, of good manners and habits, and endowed with the qualities expressed by L. 3. tit. 4. P. 3. [L. 3. tit. 4. P. 3.] This qualification or fitness consists in age, science, and capacity. In respect of age, no one under twenty-six years can hold a judicial appointment,<sup>10</sup> L. 2. tit. 9. lib. 3. Rec. [L. 6. tit. 1. lib. 10. Nov. Rec.] As regards science, every judge must have studied ten full years,<sup>11</sup> L. 2. tit. 9. lib. 3. Rec. [L. 6. tit. 1. lib. 11. Nov. Rec.], and must decide by the laws of the kingdom, L. 4. tit. 1. lib. 2. Rec. [L. 5. tit. 2. lib. 3. Nov. Rec.] Finally, in regard of capacity, neither the insane (*loco*), the dumb, the deaf, the blind, the habitually infirm, the religious, the female, nor the clergyman can be a judge, L. 7.<sup>12</sup> and 8. tit. 9. lib. 3. and L. 10. tit. 3. lib. 1. Rec. [L. 4. and 5. tit. 1. lib. 11. and L. 5. tit. 9. lib. 1. Nov. Rec.]

As a judge ought to be a good man (*hombre bueno*), it is inferred that no man of ill conduct can be judge nor alcalde, L. 7. tit. 9. lib. 3. Rec. [L. 4. tit. 1. lib. 11. Nov. Rec.] 2d, Nor he who receives presents for administering justice, L. 5. tit. 9. lib. 3. Rec. [L. 7. tit. 1. lib. 11. Nov. Rec.] 3d, That no one can be such in causes in which his

<sup>8</sup> Not inserted in the Nov. Rec.

<sup>9</sup> The law quoted seems to forbid it altogether. Vide L. 1. tit. 10. lib. 4. Nov. Rec.

<sup>10</sup> And the penalty, in such person accepting it, is, by the law quoted, incapacity to hold the like or other offices in future. *Palacios* says, that the age stated in the text is, with reference only to a professional judge (*letrado*); and that L. 2. tit. 9. lib. 3. Rec. (L. 6. tit. 1. lib. 11. Nov. Rec.), does not alter L. 3. tit. 9. lib. 3. Rec. (L. 3. tit. 1. lib. 11. Nov. Rec.), which, in respect to the office of an ordinary or unprofessional judge (*Juez ordinario*), allows a person of twenty years of age to hold it.

<sup>11</sup> This law relates to the incompetency of a slave to be judge.

<sup>12</sup> The civil or canon law is understood, adds *Palacios*.

relations and friends (*allegados*) are interested, L. 9.<sup>13</sup> and 10.<sup>14</sup> tit. 4. P. 3. [L. 9. and 10. tit. 4. P. 3.]

The obligations of judges are very numerous, and do not properly belong to the objects of our institutes. Reference is made to L. 6, 7, 8, 12, 13, 14, 15, and 16. tit. 4. P. 3. and L. 3. and 16. tit. 9. lib. 3. Rec. [L. 6, 7, 8, 12, 13, 14, 15, and 16. tit. 4. P. 3. and L. 3. tit. 1. and tit. 35. lib. 11. Nov. Rec.]

Cap. 7. There are three kinds of judges, ordinary, delegated, and arbitrators or judges of fact (*arbitros*). The ordinary are persons who are ordinarily appointed to perform their offices in regard of those over whom they are to decide in places in which they have jurisdiction, L. 1. tit. 4. P. 3. [L. 1. tit. 4. P. 3.] In this class are comprehended all judges who are appointed officially by the king, as magistrates (*corregidores*), alcaldes, &c., L. 1. tit. 4. P. 3.; with regard to whose powers, privileges, and other things belonging to their office and duties, there are various provisions collected in various titles of Lib. 2. Rec.<sup>15</sup> which ought to be studied with reflection.

Delegated judges are those appointed to hear and determine (*oir*) [ 247 ] certain or specific suits by command of the king or of other judges ordinary (*jueces ordinarios*), L. 19. tit. 4. P. 3. [L. 19. tit. 4. P. 3.;] and it is to be observed that he who is delegated by the king may commit to another his delegation, but not he who is delegated by the ordinary judge, L. 19. tit. 4. P. 3. [L. 19. tit. 4. P. 3.] In the person delegated by the ordinary judge these four circumstances ought to concur. 1st, That he exercise his jurisdiction in the territory of the person delegating. 2d, That the cause or suit over which the delegation devolves be within the cognisance of the person delegating. 3d, That it be not of that number which cannot be delegated according to L. 18. tit. 4. P. 3. [L. 18. tit. 4. P. 3.] 4th, That he investigate the cause to which he is commissioned, abiding in the place directed by the commission or appointed by the person delegating, L. 17. tit. 4. P. 3. [L. 17. tit. 4. P. 3.] These circumstances are not necessary with respect to the person delegated by the king, who before setting out on his commission ought to qualify himself with the solemnities of the oath, and other requisites expressed by L. 18. cap. 19. and 20. tit. 26. lib. 8. Rec.<sup>16</sup> [L. 1. tit. 14. lib. 4., L. 11. tit. 34. lib. 5., L. 16. tit. 27. lib. 4., L. 3. tit. 14. lib. 4., and L. 3. tit. 10. lib. 4. Nov. Rec.,] not being able to give as his sureties any of the officers who shall accompany him, nor the escribano de camara.

<sup>13</sup> In civil cases, it appears he may delegate another person to decide, but not in criminal, note 2 gloss. said law.

<sup>14</sup> This law forbids a person to be judge in his own cause, as also when he has been previously the advocate or counsellor.

<sup>15</sup> See tit. 11. lib. 7. Nov. Rec.

<sup>16</sup> *Palacios* says, that this law is erroneously cited; that L. 44. tit. 4. lib. 2.; L. 16. and 40. tit. 6. lib. 3.; and L. 7. tit. 1. lib. 8. Rec; (L. 1. tit. 13. lib. 7.; L. 9. tit. 1. lib. 4.; L. 4. tit. 11. lib. 7.; and L. 11. tit. 34. lib. 12. Nov. Rec.;) with some other laws, treat of this matter.

*Auto 23.* tit. 10. lib. 2. Rec. [Nota 6. tit. 10. lib. 4., Nota 15. tit. 10. lib. 4. Nov. Rec.,] explains the mode in which these judges, commissioned by the council (*concejo*), must proceed in commissions *de oficio*, not being allowed to be accompanied by agents (*diligencieros*) or *fiscals*, *Auto 9.* tit. 1. lib. 3. Rec. [Nota 7. tit. 10. lib. 4. Nov. Rec.,] nor to exceed the bounds prescribed to their powers, *Auto 4.* tit. 1. lib. 8. Rec. [L. 14. tit. 34. lib. 12. Nov. Rec.] Their commission being completed, they ought to give an account of it to the council within twenty days, L. 46. tit. 4. lib. 2. Rec. [L. 8. tit. 10. lib. 4. Nov. Rec.] without whose certificate they cannot obtain that from the fiscal of having given an account of the penalties or fines of the *camara*, *Auto 3.* tit. 13. lib. 2. Rec. [Nota 4. tit. 10. lib. 4. Nov. Rec.] The persons whom these judges shall condemn, ought to present themselves to the council within fifteen days, if within the walls of the city (*los puertos*), and within forty days if without the city, *Auto 5.* tit. 14. lib. 2. Rec. [Nota 2. tit. 14. lib. 4. Nov. Rec.]

These delegations are made for two purposes, either for the full or entire cognisance of the cause to definitive sentence, or for conducting the process (*actuar el proceso*), the judge delegating, reserving to himself the pronouncement of the sentence, L. 1. tit. 4. P. 3. [L. 1. tit. 4. P. 3.]

Every delegated judge ought to decide according to the orders of the persons delegating, L. 1. tit. 4. P. 3. [L. 1. tit. 4. P. 3.,] and from this principle it follows, that he can only hear the cause delegated and its accessory, without which the commission cannot be carried into effect (*expedirse*), L. 19. and 20. tit. 4. P. 3., L. 46. tit. 10. P. 3. [L. 19. and 20. tit. 4. P. 3., L. 46. tit. 10. P. 3.] 2d, That it is in the power of the person delegating to suspend him from the exercise of the office delegated whenever he pleases, L. 19. tit. 4. P. 3. [L. [ 248 ] 19. tit. 4. P. 3.] 3d, That the person delegating may take cognisance of (*oir*) the action of *reconvention*, and the agreement by the parties to refer to arbitrators (*compromisos*) upon matter appertaining to the commission, although nothing relating thereto be expressed in it, L. 20. tit. 4. P. 3. [L. 20. tit. 4. P. 3.] Delegated jurisdiction is terminated, 1st, By the revocation of the person delegating, L. 21. tit. 4. P. 3. [L. 21. tit. 4. P. 3.] 2d, By the non-exercise of it within the year by the person delegated, L. 35. tit. 18. P. 3. [L. 35. tit. 18. P. 3.] 3d, By the death of the person delegating, or of any of the parties before the commission is entered on (*principiarse*), L. 21. tit. 4. P. 3. [L. 21. tit. 4. P. 3.,] for the delegation once acted on is perpetuated, *Hevia, ibid.* n. 11. Of the delegation of the coroner or judge of inquest (*juez pesquisidor*), we will treat in the 11th title.

Arbitrators (*arbitros*) are mediating judges (*jueces avenidores*), who are chosen and appointed by the parties to decide the matter in dispute between them, L. 23. tit. 4. P. 3. [L. 23. tit. 4. P. 3.] These are of two kinds: the first named by the parties in order that they may determine according to law, and the others appointed by them

as friends to adjust or compose the matter that is submitted to them. Here we shall speak of the first.<sup>17</sup>

From what has been explained, the following axioms are derived. 1st, That the arbiter is in the place of the judge, although he is not properly so. 2d, That in order to be elected arbiter, the compromise or submission of the parties is required, and the acceptance of the person chosen. 3d, That the arbiter be bound to take cognisance of and decide, or give his award in the cause. 4th, That the parties are bound to obey the sentence or fulfil the award.

From the first principle it is inferred, 1st, That no person can be an arbiter who is subject to the legal impediments by which we have said a person is prevented from being a judge. 2d, That no one can be arbiter in his own cause, unless for an injury or insult, L. 24. tit. 4. P. 3. [L. 24. tit. 4. P. 3.] 3d, That the sentence given by an arbiter cannot be revoked by reason of his minority,<sup>18</sup> L. 5. tit. 4. P. 3. [L. 5. tit. 4. P. 3.] 4th, That the ordinary judge cannot be arbiter, except, indeed, to approve the submission or compromise of the parties, L. 24. tit. 4. P. 3. [L. 24. tit. 4. P. 3.] *Carleval, disputa* 2. sect. 4. num. 1212.

From the second principle it follows, 1st, That all those who can bind themselves and alienate property, may compromise or submit to arbitration, *Valeron de trans.* tit. 4. quæst. 5. n. 1. 2d, That this compromise or reference should be accompanied with a certain conventional penalty, L. 26. tit. 4. P. 3.<sup>19</sup> [L. 26. tit. 4. P. 3.] 3d, That [249] the arbitration bond (*compromiso*) be authorised by the signature of a public escribano, and set forth the suit which gives rise to the reference, the names of the arbiters, the mode in which they must proceed, and every thing necessary for the said purpose, L. 23. tit. 4. P. 3. [L. 23. tit. 4. P. 3.] 4th, That an arbitration or compromise is only valid with regard to a doubtful<sup>20</sup> cause, *Valeron, ibid.* q. 4. and

<sup>17</sup> Wood, in his *Inst. Civ. Law*, p. 326. book 4. cap. 3. says, there is an arbitrator and an arbiter; an arbitrator is, properly, a reconciler or moderator, according to equity and truth. Arbiter is the kind here treated of, and such as described in L. 4. tit. 17. lib. 11. Nov. Rec., as *arbitro juris*; and the other arbitrator, *juez amigo*, or *arbitro arbitrador*: both sorts are also distinctly treated of in the law quoted in the text, L. 23. tit. 4. P. 3. and a penalty is therein recommended to be inserted in the arbitration bonds for the performance of the award in both cases.

<sup>18</sup> Because the parties have expressly consented to his appointment.

<sup>19</sup> Vide also L. 23. tit. 4. P. 3. Though there is no penalty annexed to the submission, says Wood, *Inst.* p. 327. b. 4. c. 3.; yet an action in *factum* will lie for the performance of it. *Palacios*, referring to L. 2. tit. 16. lib. 5.; and L. 4. tit. 21. lib. 4. Rec. (L. 1. tit. 1. lib. 10.; and 4. tit. 17. lib. 11. Nov. Rec.) says, a compromise may be with or without a penalty, and the one is of equal validity with the other.

<sup>20</sup> Perhaps this is more strictly with respect to *transaccion*, which is defined a concord, or agreement of an uncertain and doubtful suit, both litigants yielding up part of their pretences on each side; the case must be doubtful, and something must be given or done. If the matter is certain in its nature, a transaction upon it is null and void: Wood, *Inst. C. L.*, p. 326. b. 4. ch. 3. The law of the Nov. Rec. quoted, does not, by its letter, go to the length of the position in the text; but *Azevedo*, in his comment on the same, L. 4. tit. 21. lib. 4. Rec. n. 21. supports it, and says, that uncertainty is the substance of the transaction; and that arbitration (*compromissum*), is like unto it. Vide this last author on this law.

L. 4. tit. 21. lib. 4. Rec. [L. 4. tit. 17. lib. 11. Nov. Rec.] 5th, That compromise or arbitration with respect to public crimes or offences, and causes of matrimony is not valid, L. 24. tit. 4. P. 3.<sup>21</sup> [L. 24. tit. 4. P. 3.] 6th, That those only can compromise or refer to arbitration who can sue; and, therefore, the minor must have the authority of his curator, L. 25. tit. 4. P. 3., [L. 25. tit. 4. P. 3.] and the proctor or judicial attorney (*á pleytos*) a special power for the purpose, unless he have a full and absolute power to perform completely all things in the suit, L. 19. tit. 5. P. 3. [L. 19. tit. 5. P. 3.] *Valeron*, tit. 4. q. 5. *á n.* 8. *al* 12.

Hence also it follows, 7th, That no one can be compelled by the ordinary judge to accept the appointment of arbiter, L. 29. tit. 4. P. 3. [L. 29. tit. 4. P. 3.] 8th, That a person may allege the following excuses for being exempted from this commission. 1st, The parties having moved the subject of arbitration before the ordinary judge. 2d, The parties having changed the arbiters. 3d, By reason of the injury or prejudice that may ensue to him. 4th, On account of being occupied in a public office or charge, or in the care of one's own property. 5th, On account of sickness, L. 30. tit. 4. P. 3. [L. 30. tit. 4. P. 3.]

From the third principle it is inferred, that the arbiter must proceed according to the rules of law, in conformity to the powers which the parties shall give him, L. 26. tit. 4. P. 3. [L. 26. tit. 4. P. 3.] 2d, That sentence ought to be awarded on the cause of arbitration, and on no other, which is not accessory to it, in the place and within the term appointed, if the parties should not prorogue it; and if no particular time hath been agreed on, that of three years is understood according to law, Ll. 32. and 37. tit. 4. P. 3.<sup>22</sup> [Ll. 32. and 37. tit. 4. P. 3.] 3d, That if any of the arbiters be absent, the others cannot determine the matter of reference without the fresh consent of the parties, L. 32. tit. 4. P. 3. [L. 32. tit. 4. P. 3.] 4th, That if the arbiters differ, a third person or umpire is chosen by the same parties, or by the ordinary judge, Ll. 26. and 29. tit. 4. P. 3. [Ll. 26. and 29. tit. 4. P. 3.] 5th, That the sentence or award pronounced by arbiters on a feast day (*dia feriado*) is not valid, unless [ 250 ] it were by those of the second class or arbitrators, L. 32. tit. 4. P. 3. [L. 32. tit. 4. P. 3.] 6th, That the causes being many, the arbiters may pronounce sentence on each in particular, unless the parties had agreed to the contrary, L. 32. tit. 4. P. 3. *al fin.* [L. 32. tit. 4. P. 3.]

By the fourth principle it is established, 1st, That the parties must obey the award within the term that is prescribed by the arbiter, and if no term hath been prescribed, within four months under the penalty stipulated, L. 33. tit. 4. P. 3. [L. 33. tit. 4. P. 3.] 2d, That

<sup>21</sup> This law adds those regarding banishment, liberty and slavery.

<sup>22</sup> *Palacios* states, it is Law 27. tit. 4. P. 3., which says that the award should be made as soon as possible, so that it may not be prolonged beyond three years from the day of the submission of the arbitration. He adds, there is no L. 37. in the title of the *Partidas* cited in the text, and he is borne out to the extent of his statement.



the parties will be exempted from the payment of this penalty on account of being unable to comply with the award, by the lawful impediment of infirmity, royal service, &c.; L. 4. tit. 4. P. 3. [L. 4. tit. 4. P. 3.] 3d, That the award which is contrary to law, good customs, or is impossible to be fulfilled, or pronounced through subornation or enmity, or beyond the limits of the matter submitted, is not obligatory, Ll. 31. and 34. tit. 4. P. 3. [Ll. 31. and 34. tit. 4. P. 3.] 4th, That there is no appeal from the award, because whoever will not abide by it, is absolved from it by paying the conventional penalty; and if there be none agreed on, by signifying his dissent to the opposite party within ten days after the award is pronounced, L. 35. tit. 4. P. 3. [L. 35. tit. 4. P. 6.] 5th, That exclusively of these cases, the ordinary judge may compel the fulfilment of the award at the instance of any of the parties, L. 35. tit. 4. P. 3. [L. 35. tit. 4. P. 3.]

From all that has been said, it is inferred, 1st, That the office of arbiter is at an end by the death of any of the parties, unless the heirs be expressly bound by the submission, in which case the arbitration may be proceeded in with citation to them, [L. 28. tit. 4. P. 3. [L. 28. tit. 4. P. 3.] 2d, That the office is at an end by the civil or natural death of the arbiters, L. 28. tit. 4. P. 3 [L. 28. tit. 4. P. 3.] 3d, By the loss or destruction of the thing in dispute, L. 28. tit. 4. P. 3. [L. 28. tit. 4. P. 3.] 4th, By reason of the time allowed for the completion of the compromise, or reference having expired, L. 27. tit. 4. P. 3. [L. 27. tit. 4. P. 3.]

Cap. 8. Trial is the legal debate or controversy, and decision of a cause before and by a competent judge. Trials are divided principally, 1st, Into ordinary, extraordinary, and summary. Ordinary trial is that in which the proceeding is carried on according to the order and solemnities of law. Extraordinary is that which is carried on without this solemnity: summary is that when the process is carried on simply, briefly without the form or solemnity of law, *Hevia, Cur. Filip.* p. 1. § 8. num. 2. 2d, Trials are divided into civil, criminal, and mixed, [ 251 ] by reason of the cause: if this cause is merely civil, relative to the particular interest of the person, it is called a civil trial or suit (*juicio civil*): when the cause appertains to any crime, the trial is criminal: and it will be mixed if it participates of both civil and criminal. Lastly, a trial may be divided into petitory and possessory, accordingly as it may have for its object the possession or the property.

## TITLE II.

## OF THE DIFFERENCE OF JURISDICTION; AND OF COMPETENCY.

THERE often arises a doubt who is the legitimate and competent judge of the cause. The determination of this point depends on the knowledge of the nature and diversity of jurisdictions (*fueros*).

Cap. 1. Jurisdiction (*fuero*) is the place of trial where the right and justice of the parties who litigate are discussed, *Hevia, Cur. Filip.* p. 1. § 5. num. 1. Jurisdiction being secular and ecclesiastical, each has its peculiar jurisdiction (*fuero*)<sup>1</sup> for the causes which belong to it; whence arises the distinction of ecclesiastical and secular jurisdiction, to which ought to be added the third species of mixed jurisdiction, regarding causes which belong to both jurisdictions; of which kind are the causes respecting the payment or non-payment of ecclesiastical tithes; respecting pious bequests, and the execution of testaments, if the year of the executorship hath passed by without their being fulfilled, *Hevia, ibid.* § 5. num. 13.

The rule is, that to the ecclesiastical jurisdiction belong spiritual causes, and those annexed to them; such are the causes relating to the right of patronage, tithes, first-fruits, marriages, burials, benefices, &c. L. 5. tit. 1. lib. 4. Rec.<sup>2</sup> [L. 5. tit. 1. lib. 2. Nov. Rec]; it being observed that patrimonial suits, and other ecclesiastical ones relating to benefices, must be entertained in the audiences, L. 21. tit. 4. lib. 1. Rec.<sup>3</sup>; the reader is referred to *Bobadilla* in his *Politica*, lib. 2. c. 17 and 18, where he treats fully of the causes belonging to every kind of jurisdictions (*fueros*).

There are seven causes<sup>4</sup> from which the diversity of jurisdictions (*fueros*) proceeds, and which render the judge competent for the cognisance of them.

1st, Domicile, so that any person may be sued before the judge of the place where he is found settled, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]

2d, Birth-place (*patria*), provided the defendant be not absent

<sup>1</sup> It is difficult to find different words to express the meaning of *jurisdiction* and *fuero*. Jurisdiction, with us, means both legal authority, or power of judging, and the district or place to which that authority extends: in Spanish, the word *jurisdiccion* is used to denote the first, and *fuero* the latter. and *fuero* also means the tribunal of the judge.

<sup>2</sup> *Palacios* says, this law is erroneously cited for L. 56, tit. 6. p. 1.

<sup>3</sup> Not inserted in the *Nov. Rec.* *Palacios* says it is erroneously cited for *Aut.* 2. tit. 6. lib. 1. *Rec.* (L. 4. tit. 21. lib. 1. *Nov. Rec.*)

<sup>4</sup> *Palacios* says, L. 32. tit. 2. P. 3. points out fourteen causes; but that they are commonly reduced to four, which are domicile, contract, crime, and situation or place of thing.

from it, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.] *Carleval*, tit. 1. disp. 2. quæst. 2. num. 63.

3d, The place where the property is situate, although the defendant be not a native of it, nor domiciled there, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]; but this is understood when the plaintiff institutes a real, and not a personal action, *Carleval*, *ibid.* quæst. 3. num. 151.

4th, The place where the contract is entered into which gives rise to the suit,<sup>5</sup> L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]

5th, The heir may be cited, in quality of heir and successor, before the competent judge of his deceased ancestor, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.], provided he be not a clergyman (*clerigo*) who is privileged as to his jurisdiction, *Carleval*, *ibid.* quæst. num. 307.

6th, The commission of crime requires the prosecution and punishment of the delinquent in the place where he perpetrated it, L. 32. tit. 2. P. 3. [L. 32. tit. 2. P. 3.]

[ 253 ] 7th, Finally, the privilege of exemption from jurisdiction prevents the defendant from being sued but before the judge of his jurisdiction. These privileges are, 1st, That of the clergy, to be sued in all cases before the ecclesiastical judge, L. 50. tit. 6. P. 1. [L. 50. tit. 6. P. 1.] and L. 5. tit. 3. lib. 1. Rec. [L. 3. tit. 1. lib. 2. Nov. Rec.] This privilege extends also to those of the first clerical degree (*tonsurados*) provided they wear the tonsure and clerical habit, have a benefice, and reside on it, or are occupied in another place with the license of the bishop, L. 1. tit. 4. lib. 1. Rec. [L. 6. tit. 10. lib. 1. Nov. Rec.] 2d, Religious persons, of whose causes the judges conservators (*conservadores*) have cognisance, in virtue of bulls and apostolic *indultos*, possess privilege of jurisdiction, *Carleval*, *ibid.* sect. 2. Knights of military orders must be sued before their judges in criminal causes; and in civil ones belonging to the commanderies (*encomiendas*) of the order; but in other civil causes, and even in criminal ones, in many cases in which knights commit offences as such, they are subject to the ordinary jurisdiction, *Auto* 9. tit. 1. lib. 4. Rec. [L. 12. tit. 8. lib. 2. Nov. Rec.] *Carleval*, *ibid.* sect. 3.; and the king being the supreme master of these orders, he may delegate the cognisance of the causes of knights to the judges he may think fit, *Auto* 2. tit. 1. lib. 4. Rec. [L. 10. tit. 8. lib. 2. Nov. Rec.] 4th, Matriculated students, whose judge is the rector of the university, enjoy the privilege of jurisdiction, L. 28. tit. 7. lib. 1. Rec. [L. 7. tit. 10. lib. 12. Nov. Rec.], except in cases of resistance to the officers of justice, or of using prohibited arms. 5th, Military persons possess a particular jurisdiction, whose judges are the auditors of war,<sup>6</sup> *Orden. Milit.*; but the militia are subject, in the first instance, to the ordinary judge even in criminal causes, *Auto* 27, 28. and 30. tit. 4. lib. 6. Rec. [L. 12. tit. 9., L. 10. tit. 2. lib. 7., and *Nota* 10. tit. 6. lib. 6. Nov. Rec.] 6th,

<sup>5</sup> *Palacios* observes, that it is stated by *Covarrubias*, cap. 1. *Pract. Quæst.*, that in order to competency of jurisdiction, in respect to the place of contract, it is necessary that the defendant be found in it at the time the action is entered against him.

<sup>6</sup> See Proclamation 9th February, 1815, Appendix U.

Officers of the inquisition enjoy their own jurisdiction in criminal causes only, except when they proceed from capital (*mayores*) offences, expressed by L. 18. c. 4, 5, and 6. tit. 1. lib. 4. Rec. [L. 1. tit. 7. lib. 2. Nov. Rec.] This privilege ceases in causes relating to the felling of forests (*talas de montes*), ordinances of police, and resistance to justice, *Cedula of August 18th, 1673.*<sup>7</sup> 7th, Widows, wards, poor and miserable persons, have the privilege of pleading to the jurisdiction of the inferior judge, and of having recourse to the superior tribunals, which is termed *caso de corte*, L. 5. tit. 3. P. 3. [L. 5. tit. 3. P. 3.]; who miserable persons are, is explained [254] by *Carleval, ibid. sect. 7.* from num. 529. *ad finem.* 8th, The cognisance of causes of the royal rents is reserved to the superintendants and subdelegates of the royal revenue (*real hacienda*), *Auto* 2. tit. 7. lib. 9. Rec. [L. 6. tit. 10. lib. 6. Nov. Rec.], who have also cognisance of the causes of their dependents, when such causes relate to the fulfilment of its duty, as appears by various decrees of his majesty. Reference may be had to L. 1. cap. 3, 4, and 5. and L. 2. cap. 25. and 26. tit. 2. lib. 9. Rec. [L. 2. tit. 10. lib. 6., L. 1. tit. 14. lib. 10., L. 3. tit. 10. lib. 6. Nov. Rec.] 9th, The prior and consuls of the city of Burgos have exclusively cognisance of suits and disputes which may occur between merchant and merchant, with respect to their dealings and affairs; from whose sentence there is only an appeal to the *corregidor*, or lord mayor of the city, L. 1. cap. 1, 2. 4. and 12. tit. 13. lib. 3. Rec. [L. 1. 2, and 3. tit. 2. lib. 9. Nov. Rec.] This privilege hath been extended to the *consulados* or tribunals of commerce of Madrid, Bilbao, and Seville, L. 1. cap. 13. and L. 2. tit. 13. lib. 3. Rec.

It is to be observed that all these jurisdictions cease in causes of tumult and popular commotion, so that the guilty are subject to the ordinary jurisdiction, *Order (decreto) of 2d October, 1766.* [L. 4. tit. 11. lib. 12. Nov. Rec.]

Cap. 2. When the ecclesiastical judge intermeddles in the cognisance of causes merely profane, the party aggrieved may appeal and protest to the royal assistance against the injury. Then the complainant presents a petition, having recourse by way of protection to the royal tribunal of the district where the ecclesiastical judge resides, a decree or writ issued by the ordinary judge, charging the ecclesiastical to rescind for the term of eighty days, any censure he may have imposed, and ordering him to remit to the ordinary tribunal the original proceedings. Having seen these proceedings, if the ordinary judge declares that the ecclesiastical judge has done wrong, or exceeded his jurisdiction in taking cognisance of this cause, every act is annulled or revoked; but if it is declared that he has not exceeded his jurisdiction, the proceedings are returned to him in order that he may do justice, *Aut.* 4. cap. 2. tit. 1. lib. 4. *Bobadilla*, Lib. 2. cap. 17. num. 182. L. 39. tit. 5. lib. 1. Rec.<sup>8</sup>

<sup>7</sup> Not in Chronological Index of the Nov. Rec.

<sup>8</sup> Not inserted in Nov. Rec. *Palacios* says, it is wrongly cited for L. 36. tit. 5. lib. 2. Rec. (L. 2. tit. 2. lib. 2. Nov. Rec.)

This recourse of appeal (*recurso de fuerza*), which they call a writ of prohibition<sup>9</sup> (*auto de legos*), is founded on the defence and protection which the prince affords, in order that ecclesiastics may [ 255 ] not injure nor oppress his vassals. In this case, there intervenes an extrajudicial cognisance, by means of a view and information of the proceedings, without treating of, or discussing the principal matter of the cause, *Salgado de Regid protect.* p. 1. cap. 1. *prelud.* 5.

With respect to this kind of recourse, the following rules must be borne in mind: 1st, That it does not take place in matter relating to the inquisition, *Auto* 3. tit. 1. lib. 4. Rec. [L. 3. tit. 7. lib. 2. Nov. Rec.] 2d, That appeals (*recursos de fuerza*) from the vicar of Alcala are determined in the council, *Auto* 15. cap. 25. tit. 4. lib. 2. Rec. [Notas, 2. 6, 7. 9, and 10 tit. 5. lib. 4. Nota 4. tit. 2. lib. 2. Nota 12. tit. 10. lib. 12. Nov. Rec.] 3d, That appeals from ecclesiastical judges with respect to the property (*espolios*) which bishops leave are preferred to the council, *Auto* 23. tit. 4. lib. 2. Rec.; [Nota 5. tit. 2. lib. 2. Nov. Rec.] as also those with respect to excise duties (*millones*), *Auto* 35. tit. 4. lib. 2. Rec. [L. 15. tit. 2., lib. 2. Nov. Rec.] 4th, That in appeals of consequence (*de gravedad*), the court of government (*sala de gobierno*) may call to it those of 1500 (*mil y quinientas*), *Auto* 71. cap. 13. tit. 4. lib. 2. Rec. [L. 4. tit. 3., L. 2. tit. 16., L. 4 and 5. tit. 4. L. 7. tit. 14. L. 19. tit. 7. lib. 4. L. 8. tit. 22. lib. 11. L. 9. tit. 9. and L. 12. tit. 27. lib. 4. Nov. Rec.] 5th, That the appeals of the Indians go before the council of the Indies, L. 4. tit. 2. lib. 2. Rec. de Ind., which repeals *Auto* 2. tit. 4. lib. 2. Rec. [L. 4. tit. 2. lib. 2. Rec. Ind. Nota 3. tit. 2. lib. 2. Nov. Rec.] 6th, That friars and monks may have recourse to the council from any part of Spain against the injuries and oppressions of their superiors, L. 40. tit. 5. lib. 2. Rec. [L. 9. tit. 2. lib. 2. Nov. Rec.] 7th, That the audiences do not take cognisance by way of appeal (*por via de fuerza*) of things relating to the decree of the council of Trent, because these applications go to the council, L. 81. tit. 5. lib. Rec.<sup>10</sup> 8th, That these suits for redress of judicial injury (*pleytos de fuerza*) may be sentenced or decided on review (*en revista*), L. 38. tit. 5. lib. 1. Rec.<sup>11</sup>

Cap. 3. There is another recourse against injury (*recurso de fuerza*) when the ecclesiastical judge denies or refuses the appeal interposed by any of the parties, of which we shall treat with more propriety in the 9th title. Besides the case referred to, if the question of competency is raised between two tribunals, it belongs to the fiscal to form it; and then each tribunal respectively appoints two ministers or agents (*ministros*), and both consult his majesty on the appointment of the fifth, who decide the competency; this is to which

<sup>9</sup> Vide, 3 *Black. Com.*, p. 112 and 113., edit. 1809.

<sup>10</sup> Not in *Nov. Rec.*: *quære*, L. 8. tit. 5. lib. 1. Rec. which is L. 9. tit. 6. lib. 1. Nov. Rec.

<sup>11</sup> Not in *Nov. Rec.*: wrongly cited for L. 38. tit. 5. lib. 2. Rec. (L. 32. tit. 1. lib. 5. Nov. Rec.) *Palacios*.

belongs the cognisance of the cause, *Auto* 10 and 12.<sup>12</sup> tit. 1. lib. 4. Rec. [Nota 5. tit. 1. lib. 4. Nov. Rec.]

Upon this particular, it ought to be observed: 1st, That no question of competency can be formed with the tribunal of the crusade, in respect to the recovery of the subsidy, *Auto* 4. cap. 12.<sup>13</sup> tit. 1. lib. 4. Rec. 2d, That in a cause relative to confiscated property, [ 256 ] no question of competency is formed, *Auto* 45.<sup>14</sup> cap. 1. tit. 1. lib. 4. Rec.<sup>15</sup> 3d, Nor with respect to causes of the officers of the inquisition; if the council shall consider that they are of that class, the cognisance of which appertains to the tribunals of ordinary justice, they may consult his majesty, *ibid.* *Auto* 45. cap. 2. tit. 1. lib. 4. Rec.<sup>16</sup> 4th, That the tribunal of the inquisition admits the competency when the royal authority (*la justicia real*) is exercised against the officers of the inquisition for crimes committed in the performance of their offices and duties, *ibid.* *Auto* 45. cap. 3.;<sup>17</sup> as also, if it shall be doubted whether the cause in its origin is or is not privileged, *idem.* *Auto* 45. cap. 4.<sup>18</sup> 5th, That when the inquisition answers that it does not admit the question of competency (*competencia*), it must express the reason, *idem.* cap. 6.<sup>19</sup>

<sup>12</sup> Not in *Nov. Rec.*

<sup>13</sup> This chapter of the *auto* quoted, does not appear in the *Nov. Rec.*

<sup>14</sup> *Auto* 5, says *Palacios*, here, and in the three subsequent similar references in the text.

<sup>15</sup> Not in *Nov. Rec.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

## TITLE III.

## OF THE PLAINTIFF, DEFENDANT, PROCTOR OR ATTORNEY AND ADVOCATE.

[257] THE principal persons who compose the court or trial are, the judge, (of whom we have already spoken,) the plaintiff, the defendant, the proctor or attorney, and the advocate.

Cap. 1. The plaintiff is he who institutes this suit or demand at law, to obtain right or justice, L. 1. tit. 2. P. 3. [L. 1. tit. 2. P. 3.] The defendant is he against whom any suit or demand at law is instituted or preferred, *Procl.* tit. 3. P. 3. [Prol. tit. 3. P. 3.]

[258] In these definitions it is established, 1st, That the plaintiff claims or alleges some right. 2d, That the defendant is he from whom something is demanded. From the first principle it follows, 1st, That the child or grandchild who is under the power (*en potestad*) of the father or grandfather, cannot sue him except it be on account of aliment, or on account of the deterioration of property, which the child hath acquired from another person, L. 2. tit. 2. P. 3. [L. 2. tit. 2. P. 3.] 2d, That these persons being free or exempt from paternal authority or power, may sue their fathers or grandfathers, asking first permission<sup>1</sup> through motives of respect, L. 3. tit. 2. P. 3. [L. 3. tit. 2. P. 3.] 3d, that the person under 25 years of age, the dumb, the deaf, the insane or *non compos mentis* (*loco*), and prodigal, cannot appear in a law suit in quality of plaintiffs or defendants without authority of their curators; and not having them, the judge ought to appoint them officially, Ll. 7. and 11. tit. 2. P. 3., and Ll. 12. and 13. tit. 16. P. 6. [Ll. 7. and 11. tit. 2. P. 3., and Ll. 12. and 13. tit. 16. P. 3.] 4th, That the wife cannot appear in suit without the permission of her husband, L. 3. tit. 3. lib. 5. Rec. [L. 12. tit. 1. lib. 10. Nov. Rec.,] and the judge may also, with cognisance of the cause, oblige the husband to give his assent<sup>2</sup>, L. 4. tit. 3. lib. 5. Rec. [L. 13. tit. 1. lib. 10. Nov. Rec.]

From the second principle it arises, 1st, That friars and monks cannot be sued, and the cause ought to be carried on with the monastery, L. 10. tit. 2. P. 3. [L. 10. tit. 2. P. 3.] 2d, That the demand being laid against any corporation (*consejo*), or university, it is sufficient to have recourse to the syndic or the attorney (*procurador*), L. 13. tit. 2. P. 3. [L. 13. tit. 2. P. 3.] 3d, That in causes respecting an

<sup>1</sup> i. e. of the judge.

<sup>2</sup> And if the husband refuses, the judge himself may grant the wife the necessary permission, L. 13. tit. 1. lib. 10. Nov. Rec., *et fin.*

inheritance. the heirs are lawful defendants, L. 14. tit. 2. P. 3. [L. 14. tit. 2. P. 3.] and if they shall be found absent, and cannot come, the judge, having information of it, appoints a curator and defender of the property, L. 12. tit. 2. P. 3. [L. 12. tit. 2. P. 3.]

Cap. 2. Any person may be a party to a suit by himself or by attorney, who is he who manages or conducts any suits or the affairs of another by command or desire (*mandado*) of the principal, L. 1. tit. 5. P. 3. [L. 1. tit. 5. P. 3.]; whence result the following axioms, 1st, That only the absolute master of his affairs may appoint an attorney. 2d, That the latter is constituted by commission (*mandato*), and lawful power. From the first principle it is deduced, that one under twenty-five years of age cannot appoint an attorney without the consent of his curator, unless it be for his benefit, Ll. 2. and [259] 3. tit. 5. P. 3. [Ll. 2 and 3. tit. 5. P. 3.] From the second principle it is inferred, 1st, That a minor,<sup>3</sup> a woman (*muger*), a madman, (*loco*), a deaf person (*sordo*), a prodigal, a clergyman, a religious person (*religioso*), and a powerful person (*hombre poderoso*), a military man, and other persons employed in his Majesty's service, cannot be attorneys, Ll. 4, 5, 6, 7, 8, and 9. tit. 5. P. 3. [Ll. 4, 5, 6, 7, 8, and 9. tit. 5. P. 3.] 2d, That notwithstanding what is expressed in L. 10. tit. 5. P. 3. [L. 10. tit. 5. P. 3.] one must sue and be sued in the present day, in the audiences and chambers, through the medium of a proctor or solicitor of the number admitted, who before exercising their office are examined, and being incompetent, may be excluded, Ll. 1. and 10. tit. 24. lib. 2. Rec. [Ll. 1. and 12. tit. 31. lib. 5. Nov. Rec.] They cannot prefer any allegation, nor petition in one hall or court (*sala*) which they shall have preferred in another, L. 9. tit. 24. lib. 2. Rec. [L. 10. tit. 31. lib. 5. Nov. Rec.] They ought to deliver to the advocates the money and writings or papers, (*escrituras*), which the parties shall send them, L. 7. tit. 24. lib. 2. Rec. [L. 8. tit. 31. lib. 5. Nov. Rec.] and they are made responsible for the proceedings, so that they must return them within the terms prescribed, L. 4. tit. 24. lib. 2. Rec. [L. 6. tit. 31. lib. 5. Nov. Rec.] 3d, That when the attorney appears in the suit, he must exhibit a sufficient power or authority, although it be in the same proceedings, certified or attested by an advocate, L. 2. tit. 24. lib. 2. Rec. and L. 24. tit. 16. lib. 2. Rec., and Ll. 13. and 14. tit. 5. P. 3. [L. 3. tit. 31. lib. 5. and L. 3. tit. 3. lib. 11. and L. 8. tit. 10. lib. 11. Nov. Rec. and Ll. 13. and 14. tit. 5. P. 3.] 4th, That the attorney cannot exceed the limits of his power, nor substitute, unless he should have authority to do so, or free and full or ample power (*un poder libre y lleno*), L. 19. tit. 5. P. 3. [L. 19. tit. 5. P. 3.] 5th, That the ratification of what has been done by an attorney, considered as such, has the force or virtue of a commission or authority (*mandato*), L. 20. tit. 5. P. 3. [L. 20. tit. 5. P. 3.] 6th, That if there be several attorneys, the suit must be carried on with

<sup>3</sup> Judicial attorney (*para pleytos*) is understood, says *Palacios*; for a person above seventeen years of age may be an extra-judicial attorney (*para negocios*), L. 19. tit. 5. P. 3.



him who begun it, and if all shall commence it, it will be sufficient that one of them prosecute it for the rest, L. 18. tit. 5. P. 3. [L. 18. tit. 5. P. 3.] 7th, That if the power of the attorney should appear doubtful or suspicious, he shall not be permitted to pursue it, without giving security that the principal shall hold as firm and valid whatever he shall do, L. 12. tit. 5. P. 3. [L. 12. tit. 5. P. 3.] 8th, That he is responsible to the party for the injury (*vaño*), which he shall occasion by his fault (*culpa*), L. 26. tit. 5. P. 3. [L. 26. tit. 5. P. 3.] 9th, That on rendering his accounts, he shall be paid his expenses (*gastos*), except they should be incurred through his bad faith, contumacy, &c., L. 25. tit. 5. P. 3. [L. 25. tit. 5. P. 3.] 10th, That in order to demand restitution on behalf of the minor or the child, that any one retains against the will of the father, or to accuse as suspicious a [260] guardian, a special power is necessary, Ll. 15, 16, and 17. tit. 5. P. 3. [Ll. 15, 16, and 17. tit. 5. P. 3.] 11th, That the power for suits, or judicial power, is at an end by the death of the principal or of the attorney, if it happen before contestation, but not if after; by revocation or renunciation, provided it be communicated or made known to the party, Ll. 23, and 24. tit. 5. P. 3.<sup>4</sup> [Ll. 23, and 24. tit. 5. P. 3.]

Cap. 3. An advocate is a person who advocates the cause of another or his own, in suing or defending, L. 1. tit. 6. P. 3. [L. 1. tit. 6. P. 3.] The minor of 17 years of age, the deaf, the dumb, the madman, the prodigal, the friar, a woman, an infamous person, or one guilty of a heinous offence (*delito mayor*), a jew, &c., cannot be an advocate, Ll. 2, 3, 4, 5, and 6. tit. 6. P. 3. [Ll. 2, 3, 4, 5, and 6. tit. 8. P. 3.] The obligations adherent to the profession of an advocate, are comprehended under the following dispositions, conformable to our laws, 1st, That no one can be an advocate without being first examined, and swearing that he will conduct himself faithfully, and will not defend unjust causes, Ll. 1. and 2. tit. 16. lib. 2. Rec. [Ll. 1. and 3. tit. 22. lib. 5. Nov. Rec.] 2d, That they allege facts briefly, and do not cite laws, L. 4. tit. 16. lib. 2. Rec. [L. 1. tit. 14. lib. 11. Nov. Rec.] 3d, That they do not advocate contrary to the disposition or authority of the law, L. 16. tit. 16. lib. 2. Rec. [L. 13. tit. 22. lib. 5. Nov. Rec.] 4th, That they first see the proceedings, and do not allege malicious things, L. 13. tit. 16. lib. 2. Rec. [L. 17. tit. 22. lib. 5. Nov. Rec.] 5th, That the advocate who hath assisted one party in the first instance, may not assist the opposite party in the second, L. 13. tit. 16. lib. 2. Rec. [L. 17. tit. 22. lib. 5. Nov. Rec.] 6th, That at the commencement of the suit, they take a report of the affair, signed by the party, L. 14. tit. 16. lib. 2. Rec. [L. 10. tit. 22. lib. 5. Nov. Rec.] 7th, That no one discover the secret of his party, nor abandon the cause

<sup>4</sup> It may be here observed that, in Trinidad, an advocate, practising in the tribunals there, is appointed, under the character of defender of absent persons, to defend or support, judicially, the rights and interests of unrepresented absent defendants, and claims against the estate of deceased intestate persons, whose heirs are absent, and unrepresented in the colony. Vide L. 12. tit. 2. P. 3.

which he shall have begun, L. 17. and 22. tit. 16. lib. 2. Rec. [L. 11. and 12. tit. 22. lib. 5. Nov. Rec.] 8th, That they cannot demand anything on account of the success of the suit, L. 8. tit. 16. lib. 2. Rec. [L. 22. tit. 22. lib. 5. Nov. Rec.] 9th, That no one may advocate in a cause in which his father, son, son-in-law, or father-in-law, are judges or escribanos, L. 34. tit. 16. lib. 2. and L. 7. tit. 25. lib. 4. Rec. [L. 2. tit. 14. lib. 11., L. 29. tit. 22. lib. 5. and L. 6. tit. 3. lib. 11. Nov. Rec.] 10th, That they may not ask or put questions or positions upon what has been confessed by the parties, L. 4. tit. 7. lib. 4. Rec. [L. 4. tit. 9. lib. 11. Nov. Rec.]

With respect to reporters (*relatores*), and escribanos, our laws have laid down the most fit provisions, which are found collected in Titles 17, 19, 20, and 21. lib. 2. Rec.

## TITLE IV.

## OF ACTIONS AND DEMANDS.

[ 261 ] § 1. ACTION is the legal demand of one's right<sup>1</sup> (*el derecho de la cosa que se pretenda*). The principal division of actions, according to our jurisprudence, is into real, personal, and mixed. By real action the dominion or property in the thing<sup>2</sup> is demanded or sued for: by personal, the right which belongs to one in virtue of any contract;<sup>3</sup> the mixed partakes of both; such is the personal action strengthened or confirmed by the establishment of a mortgage. Actions are also divided into civil and criminal, according to the quality of the trials or suits (*juicios*).

The exercise or prosecution of the action<sup>4</sup> unto definitive sentence is called instance, *Hevia*, part 1. § 9. num. 1.

§ 2. The cognisance of causes in first instance appertains to the ordinary judge, to whom they belong, except those which are cases of court (*casos de corte*),<sup>5</sup> for then the litigants are withdrawn from their own jurisdictions and domiciles. Of cases of court (*casos de corte*) some are notorious, so that it is sufficient to allege them; such are the causes of corporations, universities, monasteries, grandees, nobles, or persons having titles, ministers, alcaldes, and magistrates, or corregidores (*corregidores*), L. 8. tit. 3. lib. 4. Rec. [L. 9. tit. 4. lib. 11. Nov. Rec.:] but the king's servants do not enjoy the privilege of *caso de corte*, according to L. 60. cap. 4. tit. 4. lib. 2. Rec.<sup>6</sup> [L. 2. tit. 10. lib. 4. Nov. Rec.] which reforms or amends<sup>7</sup> L. 9. tit. 3. lib. 4. Rec. [L. 10. tit. 4. lib. 11. Nov. Rec.] There are other *casos de corte* upon which it is necessary to afford information; such are causes relating to entails (*bienes de mayorazgo*), those of miserable persons, and the criminal ones expressed in L. 8. tit. 3. lib. 4. Rec. [L. 9. tit. 4. lib.

<sup>1</sup> This is perhaps not the literal translation of the passage, but in the correct meaning; "*actio nihil aliud est quam jus persequendi in judicio quod sibi debetur*," the right and power of prosecuting in judicature for what is one's due, or the means which the law puts into a man's hands of pursuing and recovering those rights, whether perfect or imperfect, of which he is unjustly deprived. *Vide Wood, C. L. book. 2. c. 3. p. 315. Hal. Anal. C. L. book. 3. c. 1. p. 77. Sala. Inst. Rom. Hisp. tom. 2. lib. 4. tit. 6. p. 358. n. 8. Sala. Il. tom. 2. lib. 3. tit. 1. p. 124. n. 1. &c.*

<sup>2</sup> *Jus in re.*

<sup>3</sup> *Jus ad rem.*

<sup>4</sup> From contestation he adds, "*despues de la contestacion*." *Vide also Paz, Prax. 2. Annot. de Inst. num. 6. p. 9.*

<sup>5</sup> The cognisance of which belongs principally to the king, and by enactments to his council, chancery, audiences, 6 *Feb. Ad. p. 11. n. 45. and 46.*

<sup>6</sup> This quotation is incorrect.

<sup>7</sup> This does not appear. *Vide contra, 6 Feb. Ad. p. 20. n. 45.*

11. Nov. Rec.] Let reference be made to Ll. 9. and 10. tit. 7. lib. 5. Rec. [Ll. 2. and 3. tit. 24. lib. 11. Nov. Rec.,] *Villadiego, in his Política*, c. 1. n. 61.; and it is to be observed that no one enjoys the privilege of *caso de corte* in causes of ten maravedis<sup>8</sup> and under, L. 11. tit. 3. lib. 4. Rec. [L. 5. tit. 3. lib. 11. Nov. Rec.]

Any plaintiff who shall present his demand should set forth the fact with clearness, declaring whether he sues for possession or property, or whether for any right in virtue of contract, &c. If he shall sue for real property, its boundaries must be expressed, the place where it is situate; and if movable, he must point out its description, quality, weight, measure, &c., except in those cases in which the demand may be laid generally, as happens when any one demands an inheritance, castle, or village, with its limits (*términos*); the accounts of administration of the property of a minor, corporation, &c.; and also when that which is contained in any chest or portmanteau is demanded or sued for, &c., L. 4. tit. 2. lib. 4. Rec. [L. 4. tit. 3. lib. 11. Nov. Rec.] and Ll. 25, 26. 31. and 40. tit. 2. P. 3. [Ll. 25, 26. 31. and 40. tit. 2. P. 3.]

Besides this he should present, with the demand, information respecting the *caso de corte* (if it should be such) together with the written documents justificative thereof (*escrituras justificativas*); and not possessing them, he must swear that he believes he has witnesses to prove his cause: so that written documents which he may afterwards present shall not be admitted,<sup>9</sup> unless it is by swearing that until then he had no knowledge of them, L. 1. tit. 2. lib. 4. Rec. [L. 1. tit. 3. lib. 11. Nov. Rec.]

In civil suits of four hundred<sup>10</sup> maravedis and under, the proceeding is summary, without it being necessary for the demand to be in writing or by declaration. These trials or suits do not admit an appeal, restitution, nor any other remedy, L. 19. tit. 10. lib. 3. Rec.<sup>11</sup> [L. 8. tit. 3. lib. 11. Nov. Rec.]

In the same libel or declaration many different actions may be entered, but not contrary actions; for if they be contrary the plaintiff must elect that which he will bring, L. 7. tit. 10. P. 3. [L. 7. tit. 10. P. 3.] The possession and property may be also demanded at the same time, so that if the plaintiff does not prove the possession, he is at liberty to give proof of the dominion, L. 27. tit. 2. P. 3. [L. 27. tit. 2. P. 3.]

The plaintiff cannot include in his demand or declaration more than is really due to him, nor enter his action before the time, nor

<sup>8</sup> It should be ten thousand maravedis and under, L. 11. tit. 3. lib. 4. Rec. [L. 5. tit. 3. lib. 11. Nov. Rec.] *Palacios* (3).

<sup>9</sup> This is with respect only to *Casos de Corte*.

<sup>10</sup> Increased to 1000 by L. 8. tit. 3. lib. 11. Nov. Rec.

<sup>11</sup> L. 19. tit. 9. lib. 3. Rec. [L. 8. tit. 3. lib. 11. Nov. Rec.] Complaint Court, Trinidad. See Proclamations, &c. respecting ditto, Append. V, W, X. The *Alcaldes de Barrios*, or magistrates of the wards of the towns, had summary verbal cognisance of suits to the amount of 500 *reales*. *Vide nota* (1), tit. 3. lib. 11. Nov. Rec.

out of the place agreed on (*contratado*), under pain of paying three times as much with the costs and damages (*perjuicios*), L. 42. 44. and 45. tit. 2. P. 3.<sup>12</sup> [L. 42. 44. and 45. tit. 2. P. 3.,] and supposing that he should not establish all that he claims, the action will be valid with regard to what he shall prove, L. 48. tit. 2. P. 3. [L. 48. tit. 2. P. 3.]

If it shall happen that two persons shall institute a demand against a third, he who shall first cause the defendant to be cited shall be first heard; and if both shall institute it at the same time, the judge shall select him who appears to be best entitled in law, L. 6. tit. 10. P. 3. [L. 6. tit. 10. P. 3.] But when of two plaintiffs one shall demand the possession of the thing, and the other the seignory or property, the demand of the former shall be first entertained, unless the second offer immediately certain irrefragable proof of the dominion which he claims, L. 27. tit. 2. P. 3. [L. 27. tit. 2. P. 3.]

No demand can be instituted on feast days (*dias de fiesta*);<sup>13</sup> nor can farmers or husbandmen be sued when they are employed in gathering in their crops or vintages, L. 33. to 39. tit. 2. P. 3. [L. 33. to 39. tit. 2. P. 3.;] neither can it be instituted before an escribano who is the brother of the plaintiff, L. 7. tit. 25. lib. 4. Rec. [L. 6. tit. 3. lib. 11. Nov. Rec.]

[ 264 ] With respect to the mode of instituting and conducting a suit or demand, reference must be had to the practical works of Paz, Villadiego, &c.<sup>14</sup>

<sup>12</sup> *Palacios* says, there are four causes of excess of demand in regard to actions, viz. in respect to amount or quantity, time, place and manner, L. 42. tit. 2. P. 3. A plaintiff suing for more than is due to him, shall only recover what he shall prove to be actually due to him, and shall be condemned in damages and costs caused to the defendant by reason of the excess of demand, L. 43. tit. 2. P. 3., which doctrine is confirmed by L. 8. and 9. tit. 21. lib. 4. Rec. It may be remarked on the above statement, as to excess of amount due, that L. 43. tit. 2. P. 3. says, the plaintiff in such case shall be condemned in the costs or expenses [*costas ó misiones* are the words of the law, not *daños y costas*, as used by the Learned Professor,] occasioned to the defendant by reason of the excess of demand; and that L. 6. tit. 28. lib. 11. Nov. Rec. (L. 9. tit. 21. lib. 4. Rec. L. 8. *ibid.* not being inserted in Nov. Rec.) declares, the plaintiff who shall demand execution for more than was due to him shall pay double the amount of such excess (*la demasia con otro tanto*); and further, that before the writ of execution shall be granted, the judge shall swear the plaintiff as to the sum which is justly due to him, for which and no more, the execution is to be granted. With respect to excess as regards time, or, in other words, to suit in anticipation of time of payment, L. 45. tit. 2. P. 3., which relates to the point, punishes the premature plaintiff by granting to the defendant an extension of the original term of payment, equal to double the period of the anticipation of the action, and by condemning the plaintiff to pay the costs and expenses incurred by the defendant by reason thereof.

The triple penalty mentioned in the text is confined to cases in which the excess is considered as to place and manner. *Vide* L. 45. tit. 2. P. 3., cited.

<sup>13</sup> *Vide* Appendix Y, also J and Q.

<sup>14</sup> *Palacios* says, that the work called *Curia Filipica* is the one which is directed to be studied in the universities by the royal order of 5th Oct. 1802, [L. 7. tit. 4. lib. 8. Nov. Rec.], and that the work of the *Conde de la Canada* (*Instituciones practicas de los Juicios civiles*) is the most deserving of recommendation. He adds, that *Elizondo*, in his "*Practica Universal*," and *Febrero* (who is cited so often with commendation), both also treat of these matters.

## TITLE V.

## OF CITATION AND CONTESTATION.

WHEN the plaintiff presents his demand by proctor or attorney, whose power has been examined and declared sufficient, he is furnished with the writ of citation or summons for the defendant to appear within the term of the law, L. 2. tit. 2. lib. 4. Rec. [L. 2. tit. 3. lib. 11. Nov. Rec.]

Cap. 1. Citation is the summons made to one to appear before the judge or to fulfil his order, L. 1. tit. 7. P. 3. [L. 1. tit. 7. P. 3.]

If the citation should be within the limits (*puertos*) of the place of the council or audience, the person cited has the peremptory term [ 265 ] of thirty days to appear to the suit; and forty if the citation should be beyond the limits: although the judges may prorogue and shorten the term according to the quality of the person, cause, demand, distance, &c., Ll. 1. and 2. tit. 3. lib. 4. Rec., [Ll. 12 and 13. tit. 4. lib. 11. Nov. Rec.] provided they do not do it maliciously, L. 9. tit. 7. P. 3. [L. 9. tit. 7. P. 3.]

Regularly citations are made by messengers (*porteros*) and others whose office it is to cite. They cannot cite without the order of the judge, and if it be without the place, the order must be given in writing, for not being so, the citation is null, and they ought to pay the costs and prejudices, L. 3. tit. 3. lib. 4. Rec. [L. 14. tit. 4. lib. 11. Nov. Rec.]

On the nature of citation it is established, 1st, That the parties must be cited who have an immediate interest in the cause, and it is not necessary<sup>1</sup> to cite those who have only a mediate interest in it, *Hevia*, p. 1. § 12. *á n.* 3. *al* 8. 2d, That the citation must be made or served on the party in person if he can be met with, and not being to be met with it will be sufficient to serve it in his house, giving notice of it to his wife, his children, servants, &c., and if the defendant have no house, he must be cited by edict or proclamation (*pregon*), L. 1. tit. 7. P. 3. [L. 1. tit. 7. P. 3.] 3d, That if the defendant shall be found in the limits of another jurisdiction, the judge may issue his warrant requisitorial (*requisitoria*) and writ of summons, in order that he may be commanded to appear, L. 7. tit. 3. lib. 4. Rec. [L. 3. tit. 4. lib. 11. Nov. Rec.] 4th, That if he who hath cited shall not appear by himself or by his attorney, he must pay the

<sup>1</sup> But it will be useful, observes *Palacios*, referring to *Hevia* cited (which is the work usually called *Curia Filipica*), and to *Febrero* (*Reformado*), p. 2. lib. 3. cap. 1. § 3. num. 106. See Append. Q. and R, as to trial and rules in respect to civil suits.

costs and damages to the person cited, and besides one hundred *maravedis*, L. 5. tit. 3. lib. 4. Rec. [L. 6. tit. 4. lib. 11. Nov. Rec.] 5th, That through respect and decency, women (*mugeres*) must not be cited to present themselves before the judge,<sup>2</sup> L. 3. tit. 7. P. 3. [L. 3. tit. 7. P. 3.] 6th, That a woman cannot be cited before the judge who wished to use violence towards her, or to be married to her without her consent, L. 6. tit. 7. P. 3. [L. 6. tit. 7. P. 3.]

The effects of citation are, 1st, That by it the judge acquires exclusive cognisance of the cause, L. 12. tit. 7. P. 3. [L. 12. tit. 7. P. 3.] 2d, That the defendant must present himself personally or by attorney before the judge who cited him, L. 2. tit. 7. P. 3. [L. 2. tit. 7. [266] P. 3.]; therefore citations for the person cited to appear personally are not universally obligatory, L. 15. tit. 3. lib. 4. Rec.<sup>3</sup> [L. 8. tit. 4. lib. 11. Nov. Rec.] 3d, That the person cited is excused from appearing, and does not incur contumacy, being lawfully prevented by sickness, the event of a voyage or journey, urgent occupation in the service of the king, being at weddings or funerals of his relations and friends, Ll. 2. and 11. tit. 7. P. 3. [Ll. 2. and 11. tit. 7. P. 3.] 4th, That the alienation of the property or thing respecting which citation hath been made is null, except it hath been alienated or transferred by last will, for the establishment of *dote*, or, if belonging to many or several, some of them should desire to alienate it to the others; but in all these cases he to whom the thing is transferred must answer the demand, Ll. 13, 14. and 15,<sup>4</sup> tit. 7. P. 3. [Ll. 13, 14, and 15. tit. 7. P. 3.] 5th, That he who shall conceal the thing sued for, ought to pay the damage or deterioration the plaintiff shall swear to, L. 19. tit. 2. P. 3. [L. 19. tit. 2. P. 3.]

Cap. 2. When once the defendant hath been cited and the demand hath been notified to him, he must reply or plead to it (*contestarle*), admitting or denying within nine continuous days,<sup>5</sup> and otherwise he is held as contumacious and confessed,<sup>6</sup> L. 1. tit. 4. lib. 4. Rec. [L. 1. tit. 6. lib. 11. Nov. Rec.]

But this penalty does not take place with respect to the plaintiff who hath not contested the demand which the defendant hath filed

<sup>2</sup> This is understood as to civil suits, for, in respect to criminal causes, women may be summoned, and must appear personally, L. 3. tit. 7. P. 3. *Palacios* (2). See Append. I, K, Q. and R.

<sup>3</sup> See the law cited.

<sup>4</sup> L. 15. tit. 7. P. 3. This law goes further, and renders null any alienation made in anticipated apprehension of citation.

<sup>5</sup> In which feast days are counted. Vide tom. 1. *Colom. de Escrib.* p. 30. But with respect to feast days in *Trinidad*, see Order in Council, 18th May, 1822, Append. Y. also Q and R.

<sup>6</sup> This is not strictly followed. The rule is, that, after three days have elapsed from notification of the demand, the defendant is accused of contumacy, and again, after the expiration of other three days, and then a petition is filed by the plaintiff, praying the demand may be declared contested, and the cause received to proof, tom. 1. *Colom. de Escrib.* p. 30. See Append. Q. and R.

against him by way of reconvention,<sup>7</sup> L. 3. tit. 4. lib. 4. Rec. [L. 4. tit. 6. lib. 11. Nov. Rec.]

Contestation may be made even on holydays (*días feriados*),<sup>8</sup> (although the defendant is not bound to do so, L. 6. tit. 3. P. 3. [L. 6. tit. 3. P. 3.]) in any place where the judge may be found, and before the escribano of the cause,<sup>9</sup> who shall have written or enrolled the demand (*que tenga escrita la demanda*); and if he should not have written it, before any other escribano, L. 2. tit. 4. lib. 4. Rec. [L. 3. tit. 6. lib. 11. Nov. Rec.]

After contestation issue is joined (*ya trabada la litis*); by which the parties cannot revoke the demand or answer which they shall have given, L. 2. tit. 10. P. 3. [L. 2. tit. 10. P. 3.]

If the defendant shall not appear within the term, besides paying the costs and prejudices according to L. 8. tit. 7. P. 3. [L. 8. tit. 7. P. 3.,] the plaintiff is at liberty to proceed with the cause, presenting his proofs unto definitive sentence; or he may also elect to be put into possession of property of the defendant (*la via de asentamiento*), L. 2. tit. 11. lib. 4. Rec. [L. 2. tit. 5. lib. 11. Nov. Rec.] *Asentamiento* is to put a man in quiet possession of some part of the property of the person who hath been cited,<sup>10</sup> L. 1. tit. 8. P. 3. [L. 1. tit. 8. P. 3.]

If the demand or suit were real, the demandant is put in [ 267 ] possession of the property in demand, nevertheless the defendant is allowed the term of two months in which to purge his contumacy; so that not appearing within this term, the plaintiff is not obliged to answer the defendant but with respect to the question of dominion over the property.

If the demand is personal, the possession of movable property is delivered to the plaintiff; and if the defendant have none, of his real property to the amount of the debt; and he is only allowed the term of one month in which to purge his contumacy. In this last case the plaintiff may retain possession, or pray that such property may be sold to the effect of his being paid, L. 2. tit. 8. P. 3. and L. 1. tit. 11. lib. 4. Rec. [L. 2. tit. 8. P. 3. and L. 1. tit. 5. lib. 11. Nov. Rec.], which alters L. 6. and 7. tit. 8. P. 3.

It must be observed, 1st, That the plaintiff abandoning the *via de asentamiento*, may elect the mode of proof, although it be against a minor, L. 3. tit. 11. lib. 4. Rec. [L. 3. tit. 5. lib. 11. Nov. Rec.] 2d,

<sup>7</sup> See the difference of reconvention and compensation, Wood, Civ. Law, book 3. c. 9. p. 269.

<sup>8</sup> *Quere?* on such in *honorem Dei*. Vide Azévedo in L. 2. tit. 4. lib. 4. Rec. No. 2. et seq.; vide Append. Y, Q, and R.

<sup>9</sup> "Before the escribano of the cause," these words are added as collected from L. 3. tit. 6. lib. 11. Nov. Rec., cited.

<sup>10</sup> Add, on account of his contumacy. Vide the law quoted in the text. *Asentamiento*, according to Febr. Adic. tom. 2. Part. 1. p. 30. n. 56. ed. 6. Madrid, 1808, though permitted, is not practised. It may be considered the prætorian mortgage of the Romans.



That this possession of defendant's property (*asentamiento*) cannot be given in causes which do not amount to six hundred *maravedis*, L. 15. tit. 8. lib. 2. Rec. [L. 4. tit. 5. lib. 1. Nov. Rec.] 3d, That the possessor ought to preserve the fruits or products received to deliver them<sup>11</sup> to the party cited, if he shall appear within the specified terms to answer the suit (*á estar á derecho*), L. 8. tit. 8. P. 3. [L. 8. tit. 8. P. 3.]

<sup>11</sup> *Vide Greg. Lop.* gl. 3. L. 8. tit. 8. p. 3. on this.

## TITLE VI.

## OF EXCEPTIONS.

AFTER the demand is presented or instituted, the defendant [ 268 ] either consents to and acknowledges what is prayed, or perhaps opposes or prefers some exceptions. In the first case, the judge ought to appoint some term in which he is to pay or fulfil the same, L. 7. tit. 3. P. 3. [L. 7. tit. 3. P. 3.] In the second, the cause is carried on in the manner we shall point out.

Cap. 1. Exception is every defence that bars or stays the action of the plaintiff. Exceptions are divided into dilatory, peremptory, and mixed. The first are those which delay the suit, and do not put an end to it, L. 9. tit. 3. P. 3. [L. 9. tit. 3. P. 3.] Peremptory exceptions extinguish entirely the right of the plaintiff, and put an end to the cause, L. 11. tit. 3. P. 3. [L. 11. tit. 3. P. 3.] Mixed partake of the nature of both.

Dilatory exceptions are the competency of jurisdiction, suit depending, recusation<sup>1</sup> of the judge, those which relate to the person of the party, on account of being not authorised to appear in court, making the demand before the time, and with obscurity, Ll. 7. 8. and 9. tit. 3. P. 3. [Ll. 7. 8. and 9. tit. 3. P. 3.]

These exceptions impede the progress of the suit when they are opposed and proved within nine days<sup>2</sup> before contestation, L. 1. tit. 5. lib. 4. Rec. [L. 1. tit. 7. lib. 11. Nov. Rec.,] for if this term be passed, they ought not to be received in the quality of dilatory pleas or exceptions, L. 9. tit. 3. P. 3. [L. 9. tit. 3. P. 3.,] a copy of them must be given to the party, and their merit and force must be pronounced upon before going on with the cause, *Hevia*, Part. 1. § 13. num. 10.

Among all the exceptions of this class, the first which must [ 269 ] be opposed, is the plea to the jurisdiction of the judge; for otherwise it is presumed the party calls upon him to pronounce upon the other exceptions, and consequently that he submits to the jurisdiction, *Carleval, de Judiciis*, tit. 2. disp. 5. n. 7. And it is to be observed, that from the determination of the judges on pleas to jurisdiction, there is no supplication (*supplicacion*), nor other recourse,<sup>3</sup> L. 4. tit. 5. lib. 4. Rec. [L. 7. tit. 21. lib. 11. Nov. Rec.]

<sup>1</sup> See Append. Z.

<sup>2</sup> After citation, exclusively of the day thereof; this is understood if the defendant be within the jurisdiction; but if not, then nine days after the day of the last term which the judge hath assigned for his appearance.—*Palacios*. See Append. Q and R.

<sup>3</sup> This is not meant from the determination of the particular judge to whose jurisdiction the plea is made, but from that of the council and audiences, with reference thereto. *Vide* the law quoted in the text. The foregoing opinion is confirmed by a note of

The recusation, or challenge of the judge,<sup>4</sup> must be alleged in the first place, in the absence of an objection or plea to his competency, and subject to the following observations. 1st, That when any alcalde, or inferior judge, is recused, an associate is appointed with him, Ll. 1. and 2. tit. 16. lib. 4. Rec. [Ll. 1. and 2. tit. 2. lib. 11. Nov. Rec.] 2d, That he cannot be recused without just cause, L. 2. tit. 10. lib. 2. Rec. [L. 4. tit. 2. lib. 11. Nov. Rec.] 3d, That recusation is not allowed when the suit is concluded, or in a state for definitive sentence, unless the cause were new, and provided that before it be received, the party deposit thirty thousand<sup>5</sup> *maravedis*, as fully set forth in L. 4. tit. 10. lib. 2. Rec. [L. 6. tit. 2. lib. 11. Nov. Rec.] 4th, That the cognisance or trial of such suspicion or plea, is summary, L. 1. tit. 10. lib. 2. Rec. [L. 3. tit. 2. lib. 11. Nov. Rec.] 5th, That the term to prove the recusation may not exceed forty days within the limits (*aguende de los puertos*), and sixty days beyond them, nor that more than six witnesses be presented, L. 6. tit. 10. lib. 2. Rec. [L. 9. tit. 2. lib. 11. Nov. Rec.] 6th, That the decree in which the judge declares himself as not recused, may be petitioned against (*suplicar del, &c.*). See L. 7. tit. 10. lib. 2. Rec. [L. 10. tit. 2. lib. 11. Nov. Rec.,] with all that is besides laid down by tit. 10. lib. 2. Rec. [tit. 2. lib. 11. Nov. Rec.,] with respect to the recusations of oidores and counsellors.

There are two extraordinary dilatory exceptions, which cause the accumulation of proceedings (*autos y procesos*), and they are, that of a suit pending, and that of not dividing the unity which should exist in every judgment or sentence (*la continencia de la causa*). This unity or continency (*continencia*) may be of five modes, or kinds. 1st, The plaintiff and defendant having an identity of action. 2d, When there is an identity of parties, and of the thing demanded, although the action be different, as happens in possessory and petitory suits. 3d, The action and the persons being the same, but not the thing demanded, *ex. gr.* in the suits of guardianship and administration. 4th, When one action is carried on against many by reason of its cause and origin, *ex. gr.* in the suit of guardianship against many or several guardians, or when any one creditor may sue many debtors for the same obligation. 5th, If there is an identity of action [ 270 ] and of the thing, although the persons be different, as happens in suits of division, *Carleval*, tit. 2. disp. 2. num. 3.

The unity or continency of the cause does not produce the effect of accumulation of proceedings when the plaintiff and defendant are of distinct jurisdictions (*distinto fuero*), or when the party who

*Palacios* in this place, who states, that the contrary of the allegation in the text is enacted by L. 3. tit. 18. lib. 4. Rec.

<sup>4</sup> The privilege or right of recusation or challenge in respect to judges, officers, or escribanos of tribunals, hath been repealed, as regards Trinidad, by Order in Council, of the 16th September. 1822. *Vide* Appendix Z.

<sup>5</sup> Increased to 60,000, by L. 7. tit. 2. lib. 11. Nov. Rec.

opposes the exceptions does not pray it, *Carleval, ibid.* 4 num 7. al 14. In the cases in which this accumulation takes place, the original proceedings must be passed by virtue of the power (*4 poder del*) of the escribano, before whom the first suit hath been begun, *Carleval, ibid.* num. 26. Peremptory exceptions are very diverse, according to the nature of the action. They must be alleged within twenty days, which run after the nine days for contestation, which having expired, they will not be admitted, unless the defendant swear that they have recently come to his knowledge, and it being known to the judge, that he does not allege them maliciously; it being understood that if he shall not prove them within the term, he will be condemned in costs, L. 1. tit. 5. lib. 4. Rec. [L. 1. tit. 7. lib. 11. Nov. Rec.]

Mixed exceptions may be opposed as dilatory ones before contestation, or as peremptory ones to bar or extinguish the right of the plaintiff; such are transaction or accord, a thing or case adjudged (*cosa juzgada*), &c., *Carleval*, tit. 2. disp. 5. num. 4.

After publication of proofs is made, no new exception can be alleged, in order to be received for proof, unless by confession of the party or public instrument of writing, except they who prefer it, should be minors, a university, a church, &c. to whom restitution (*restitucion*)<sup>6</sup> must be allowed, in order to oppose their exceptions, provided they pray it before conclusion for definitive sentence, L. 5. tit. 5. lib. 4. Rec. [L. 1. tit. 13. lib. 11. Nov. Rec.] But these persons, to whom it is usual to grant restitution, must give bond to pay a certain penalty declared by the judge, if they shall not prove the exception, L. 6. tit. 5. lib. 4. Rec. [L. 2. tit. 13. lib. 11. Nov. Rec.]

Within the above-mentioned term, the defendant may file his reconvention or cross-bail and mutual petition, or demand of set-off, against the plaintiff; and if his proof consists of written documents, he must present them immediately; and if of witnesses, he shall swear that he has them; but if the proof consists of written documents and witnesses, he ought to present them in the term, [ 271 ] or otherwise they are not to be afterwards admitted, unless he shall swear that he had not previously knowledge of them, L. 1. tit. 5. lib. 4. Rec. [L. 1. tit. 7. lib. 11. Nov. Rec.]

The cause of reconvention or plea of set-off, is entertained at the same time with the principal demand, and is determined by the same sentence, L. 4. tit. 10. P. 3. [L. 4. tit. 10. P. 3.] Let reference be also had to *Carleval*, tit. 2. disp. 7.

Of the exceptions which the defendant shall prefer, a copy or *traslado* is given to the plaintiff to reply and make his allegations to, within six days; and if a reconvention or plea of set-off hath been alleged, he will be allowed nine days to file his answer to it. The replication of the plaintiff will be passed to the defendant for six days to make his duplication or answer to it, so that with two petitions or

<sup>6</sup> See *Wood's Int. C. L.*, book 4. c. 3. p. 321, 322. *Restitution in integrum.*

allegations on both sides, the cause is held concluded to be received for proof,<sup>7</sup> L. 3. tit. 5. lib. 4. Rec. [L. 2. tit. 7. lib. 11. Nov. Rec.]

<sup>7</sup> This is re-enacted by the Order in Council, 16th Sept. 1822, and the rules of court in reference thereto. Regard must be had to them in respect to the conduct of a suit or action in Trinidad. *Vide* Append. Q. and R.

## TITLE VII.

## OF PROOFS.

To the demand and answers, or after the conclusion of the [ 272 ] pleadings (*conclusion de pleytos*) follow the proofs upon what has been alleged, L. 1. tit. 6. lib. 4. Rec. [L. 1. tit. 10. lib. 11. Nov. Rec.], and part of L. 3. *ibid.* the termination of which depends also upon two petitions, which the parties may present,<sup>1</sup> L. 9. tit. 6. lib. 4. Rec. [L. 1. tit. 15. lib. 11. Nov. Rec.]

Cap. 1. Proof is the verification or evidence which is given in a trial or suit, in respect of any thing which is doubtful, L. 1. tit. 14. P. 3. [L. 1. tit. 14. P. 3.] Hence, it follows, 1st, That generally the plaintiff must afford it with respect to what the defendant shall deny. 2d, That it ought always to be given upon what is affirmed, unless the negation draw with it an affirmation, from which arises the general rule, that the party who denies any thing in a suit is not bound to prove it, L. 2. tit. 14. P. 3. [L. 2. tit. 14. P. 3.] 3d, That the proof by given in the suit, and upon a thing or fact relative to it, L. 7. tit. 14. P. 3. [L. 7. tit. 14. P. 3.] 4th, That being duly made, it produces entire faith with the judge.

From the first principle it results, 1st, That if the plaintiff shall not prove, the defendant is absolved, L. 1. tit. 14. P. 3. [L. 1. tit. 14. P. 3.] 2d, That both the plaintiff and the defendant ought to prove in the following cases, 1st, He who alleges minority, in order to dissolve a contract, must prove it, and the injury or fraud received, L. 4. tit. 14. P. 3.; [L. 4. tit. 14. P. 3.] as also the orphan (*huérfano*), if by reason of majority, he shall desire to be freed from the curatorship; and if the curators wish to be exempted from it, they must prove the majority

<sup>1</sup> With two petitions of each of the parties, the pleadings (*el pleyto*) must be concluded, for proof, if the cause requires it; and if it does not require proof, then for definitive sentence. According to *Febrero (Reformado)*, p. 2. lib. 3. cap. 1. § 6. num. 199., when the suit proceeds in a direct course, and there are no dilatory pleas, the practice is for the plaintiff to file two principal petitions or pleadings; which are, first, the libel or declaration; and then the replication to the contestation or plea of the defendant; in which the plaintiff must, at the same time, reply to the reconvention or plea of set-off by the defendant, if there be any; and for the defendant to file two others, the one contesting or pleading to the action, in which the reconvention or plea of set-off and the peremptory exceptions are set forth or pleaded, without presenting or filing any other for such purpose, notwithstanding what the legal disposition points out; and the other rejoining to the replication of the plaintiff, or concluding for proof; although the latter, on sight of the contestation or reconvention of the defendant, may conclude upon the whole, without filing a replication; and neither of the parties ought to present more petitions upon the principal matter or the merits, for the law holds the pleadings (*el pleyto*) as concluded. *Palacios* (1). Reference may be also had to the positive enactments, on this point, of L. 1. tit. 14. lib. 11. Nov. Rec. (L. 4. tit. 16. lib. 4. Rec.) See also the Order in Council, 16th September, 1822, establishing a new Court of Civil Jurisdiction, and the rules relative thereto, Append. Q & R.

of the orphan, L. 4. tit. 14. P. 3. [L. 4 tit. 14. P. 3.] 2d, He who hath paid through error, if he shall wish it to be restored to him, is bound to prove that he did not owe the money, unless he be a knight (*caballero*), simple laborer, ignorant of the right or law (*fuero*), a woman, and minor of fourteen, for then the opposite party must prove the debt to be real, L. 6. tit. 14. P. 3. [L. 6. tit. 14. P. 3.]

From the second principle it is inferred, 1st, That the plaintiff must prove the negative on which his intention is founded, *Gutierrez*, [ 273 ] *de juram. confirm.* P. 1. cap. 1. num. 19, and 20. 2d, That the following cases, carrying with them the affirmative, he who alleges them in the cause is bound to prove them, although he may have alleged them by a negation. These are, 1st, Negation of fitness or competency in an advocate, a judge, a witness, &c. 2d, Negation of sanity in a testator, L. 2. tit. 14. P. 3. [L. 2. tit. 14. P. 3.]

From the third principle it is inferred, 1st, That the proof must be given upon things from which formal judgment may be made, as upon a thing movable, real, the state of a person, &c. L. 7. tit. 14. P. 3. [L. 7. tit. 14. P. 3.] 2d, That the judge ought not to consent that proof be received upon useless things which do not avail the suit or judgment, and are foreign to or out of the cause, L. 7. tit. 14. P. 3. [L. 7. tit. 14. P. 3.] Ll. 7, and 4. tit. 6. lib. 4. Rec. [L. 5. tit. 10. lib. 11. Nov. Rec.] 3d, That upon what is confessed, proof ought not to be made, L. 4. tit. 7. lib. 4. Rec. [L. 4. tit. 9. lib. 11. Nov. Rec.] 4th, That the proofs ought to be shown to the judge, and not to the opposite party; although a copy or *traslado* of them shall be given to him if he shall pray it, L. 7. tit. 14. P. 3. [L. 7. tit. 14. P. 3.]

From the fourth principle it arises, 1st, That some proofs produce entire faith in law, that is, they are sufficient to condemn; and others cause half faith, or are not sufficient to condemn, *Gomez*, tom. 3. *Var. res.* cap. 12. n. 2.

Of the first class, are the six kinds of proof, of which we shall here speak; and they are, that by oath (*juramento*), that by confession of the party, that by witnesses, that by instruments, that by sight and evidence of the fact, and that by presumption,<sup>2</sup> L. 8. tit. 14. P. 3. [L. 8. tit. 14. P. 3.] all the rest form half proof; but when two half proofs concur, with respect to a thing, they will produce entire faith, *Hevia*, *Cur. Fil.* p. 1. and 17. n. 6.

Cap. 2. § 1. An oath is the attestation which is made by calling on God, or something holy, with respect to what any one affirms or denies,<sup>3</sup> L. 1. tit. 11. P. 3. [L. 1. tit. 11. P. 3.] Hence it is, that an oath is an affirmation of the truth, made religiously, L. 1. tit. 11. P. 3. [L. 1. tit. 11. P. 3.] Therefore, 1st, The person under 25 years

<sup>2</sup> The law quoted in the text says, that this last is only valid in some things: and *Greg. Lopez*, in his exposition of it, says, "*Ubi est expressum in Lege alias non: legal presumption, not presuncion de hombre ú de Juez.*" *Vide Cur. Fil. tit. prueba*, p. 93. n. 40., and L. 12. tit. 14. P. 5.

<sup>3</sup> *Vide Wood, Civ. Law*, book 4. c. 2. p. 313.

of age cannot make it;<sup>4</sup> nor the child under his father's power, unless it were with respect to property (*castrense*), nor the madman, one who has lost his memory (*desmemoriado*), and the prodigal, except with the authority of the curator, L. 3. tit. 11. P. 3. [L. 3. tit. 11. P. 3.] 2d, That the attorney who has a special power for the purpose, or *cum liberá*, may swear for his principal; or when the injury or benefit which would result from the oath, were against him alone, L. 4. tit. 11. P. 3. [L. 4. tit. 11. P. 3.] 3d, That it be with respect to a thing in which he who swears has at least some interest; [274] but guardians or the attorneys of corporations or of an hospital may swear only when proofs by witnesses or instruments shall fail them, L. 9. tit. 11. P. 3. [L. 9. tit. 11. P. 3.] 4th, That in the absence of these proofs, that by oath may be received in suits of an university; with respect to marriage or marriage contract (*casamiento*), with respect to privilege; and in criminal suits, in cases where the accused should be a man of vile and suspicious character, and the penalty not capital, L. 10. tit. 11. P. 3. [L. 10. tit. 11. P. 3.] 5th, That an oath ought to be made as to what one shall know, believe, or understand of the thing with respect to which he swears, and only in clear and certain cases, L. 11. tit. 11. P. 3. [L. 11. tit. 11. P. 3.] 6th, That the oath made through fear, in the cases expressed by L. 29. tit. 11. P. 3. [L. 29. tit. 11. P. 3.] *ad finem* is not valid. 7th, That all persons must swear before the judge, except those sick, widows, maids, old persons, and others prevented, who shall do it in their houses, L. 22. tit. 11. P. 3. [L. 22. tit. 11. P. 3.] 8th, That an oath without the solemnity of law, or that solemnity which ought to be observed according to the custom of the place, is not valid, Ll. 8. and 19. tit. 11. P. 3. [Ll. 8. and 19. tit. 11. P. 3.]

§ 2. An oath is of three sorts, voluntary, necessary and judicial. The voluntary is that which one party voluntarily offers to the other beyond the suit or out of court (*fuera de juicio*), L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.] Therefore, 1st, It must be made with the consent of the party to whom it is offered, L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.] 2d, But when once received, it causes entire faith in law, L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.] 3d, That being made with the consent of the contrary party it produces proof, although what is sworn may not be certain, L. 13. tit. 11. P. 3. [L. 13. tit. 11. P. 3.]

The necessary oath is that which the judge officially orders any of the parties to make, in order to the better proof of the truth, L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.] Whence it is, that there are as many kinds of this description of oath, as there are cases in which the judge may deem it necessary for the proof of that which is in dispute, or its value, or of the damage caused, &c.; examples of which may be seen in Ll. 5 and 6. tit. 11. P. 3. [Ll. 5 and 6. tit. 11. P. 3.] And this the party whom the judge shall command is

<sup>4</sup> *Quare?* unless under the authority of the curator. See L. 9. tit. 16. P. 3., as to the prescribed age of witnesses in civil and other suits.



obliged to make; and not being willing to obey, he is condemned in the suit, or judgment shall be given against him, unless he had just reason for not making it, L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.]

The judicial oath is that which one party tenders to the other in the [ 275 ] suit, obliging himself to abide by what the latter shall swear L. 2. tit. 11. P. 3. [L. 2. tit. 11. P. 3.] This oath may be refused by him to whom it is offered, provided he makes in return a like proposal under the same circumstances to the party who tendered it, in which case the latter cannot refuse, Ll. 2. and 8. tit. 11. P. 3. [Ll. 2. and 8. tit. 11. P. 3.] This oath may be repented of by him who calls for it before it is made by his adversary, L. 8. tit. 11. P. 3. [L. 8. tit. 11. P. 3.]

§ 3. Many advantages result from these oaths; because, 1st, By them the dominion, right, or possession of the thing is proved, Ll. 12. and 13. tit. 11. P. 3. [Ll. 12. and 13. tit. 11. P. 3.] 2d, By them the suit is put an end to, but not as though sentence had been pronounced, L. 15. tit. 11. P. 3. [L. 15. tit. 11. P. 3.]; and, therefore, 3d, If the suit should be revived, or there should be a new trial, and he who swore should affirm the contrary, a sentence given on this last oath will prevail, L. 15. tit. 11. P. 3. [L. 15. tit. 11. P. 3.] 4th, In the same manner, by a written instrument, the oath is destroyed, the sentence given by reason of the latter being revoked on account of the former, unless it be a voluntary oath,<sup>6</sup> without the direction or desire of the judge, which cannot be revoked in any case, because it only deceives the party,<sup>6</sup> L. 25. tit. 11. P. 3. [L. 25. tit. 11. P. 3.] 5th, That the minor who hath sworn not to contravene or contradict what he hath stipulated, by reason of his minority, cannot afterwards demand restitution, unless it be for prejudice by sentence, L. 16. tit. 11. P. 3. [L. 16. tit. 11. P. 3.] 6th, That if he who swore by a judicial oath he was not indebted, afterwards pays him who sued him for the debt, he may recover it back, assigning as a reason his having paid that which he did not owe, although it should be a lie; for by the judicial oath he remains discharged from the debt: but if he were absolved by sentence, and notwithstanding paid, he cannot recover, because then the truth is of more force than the sentence, L. 16. tit. 11. P. 3. [L. 16. tit. 11. P. 3.]

Oaths not only benefit him who makes them, but are also of use to his heirs; to the purchaser of the thing with respect to which the oath is made; to the other partners of the person swearing; to the surety, if it is made by the principal debtor, but not on the contrary;<sup>7</sup> and to the ward, if the gaurdian made it; but the oath of the mother to keep possession in the name of the child of whom she is pregnant, does not benefit the child, who shall be obliged to prove his quality

<sup>6</sup> Made by consent of the litigants. See L. 25. tit. 11. P. 3., cited.

<sup>6</sup> Add, "who consented to receive it from his adversary." See L. 25. tit. 11. P. 3., cited.

<sup>7</sup> This must be qualified. Vide L. 17. tit. 11. P. 3.

of heir, Ll. 17. and 18. tit. 11. P. 3. [Ll. 17. and 18. tit. 11. P. 3.] Lastly, they cannot be made in the holy places expressed by L. 5. tit. 7. lib. 4. Rec. [L. 5. tit. 9. lib. 11. Nov. Rec.]

§ 4. There is another species of oath, which is called the [ 276 ] oath of calumny, and is the oath which men make that they will proceed truly in the suit and without fraud, L. 23. tit. 11. P. 3. [L. 23. tit. 11. P. 3.] It is made either by order of the judge, the suit or pleadings being concluded for proof, L. 1. tit. 6. lib. 4. Rec. [Ll. 1. and 3. tit. 10. lib. 11. Nov. Rec.,] or on the petition of the party; in which last case, if one is absent, a decree is given for it (*se le da la provision*) within a term, L. 3. tit. 7. lib. 4. Rec. [L. 3. tit. 9. lib. 11. Nov. Rec.] It was formerly called the oath of *manquadra*; because, as there are five fingers to the hand perfect, so there are five things which the plaintiff and defendant ought to swear. 1st, The plaintiff ought to swear that he does not prosecute the suit through malice, but to obtain his right (*sino por juzgar tener derecho*), and the defendant that he does not contradict or oppose maliciously, but with an intention of showing his right. 2d, They must both swear, that always, when questioned upon any matter of the suit, they will speak the truth. 3d, That they have not bribed, nor will bribe, the judge, nor the escribano. 4th, That they will not allege any false proof. 5th, That they will not pray for any time or delay through malice, L. 23. tit. 11. P. 3. [L. 23. tit. 11. P. 3.] This oath the principals ought to make, and not the attorney or another for him, although they may have commenced the suit in their name, unless it be an attorney of a corporation, university, &c., from whom he shall have special power for it, Ll. 23. and 24. tit. 11. P. 3. [Ll. 23. and 24. tit. 11. P. 3.] It is taken in every kind of civil and criminal causes, and if the plaintiff oppose it, the defendant is absolved; and if the latter will not take it, he shall be taken as condemned, L. 23. tit. 11. P. 3. [L. 23. tit. 11. P. 3.]

§ 5. These oaths are always accompanied by the questions of the judge, or of the party who demands it, which questions should be put upon a thing that relates to the suit, and in clear and few words, Ll. 1. and 2. tit. 12. P. 3. [Ll. 1. and 2. tit. 12. P. 3.] Of these questions,\* the interrogative libel or declaration (*libelo interrogatorio*) is composed, to which the parties ought to answer by the words "*I deny or confess, I believe or do not believe;*" the answer, "that it is not known," not being received, and the party being taken as confessing those points to which he will not make answer, L. 1. tit. 7. lib. 4. Rec. [L. 1. tit. 9. lib. 11. Nov. Rec.] These answers of the party, besides being received with an oath, must be given without consulting an advocate, and without any term for deliberation, and answer is to be made to each point (*artículo*) separately, L. 2. tit. 7. lib. 4. Rec. [L. 2. tit. 9. lib. 11. Nov. Rec.]

\* Termed *posiciones*. See 6th vol. *Feb. Ad.*, p. 2. lib. 3. c. 1. § 7. p. 125. n. 288. 6th ed.: also L. 2. *et seq.*, tit. 9. lib. 11. Nov. Rec.

[ 277 ] Cap. 3. The confession of the party is called in the *Partidas* (*conocencia*) confession, which means acknowledgment, because by it the party acknowledges the right and justice of his adversary. It is the answer of consent which one party makes to the other in the suit, L. 1. tit. 13. P. 3. [L. 1. tit. 13. P. 3.] This confession is made judicially,<sup>9</sup> extrajudicially, and through torture,<sup>10</sup> L. 3. tit. 13. P. 3. [L. 3. tit. 13. P. 3.]

Hence it follows that confession ought to be made voluntarily, without error, with respect to a thing certain and reasonable, or just (*honesta*), before the party or his attorney, and by a competent person, L. 4. tit. 13. P. 3. [L. 4. tit. 13. P. 3.] Whence it arises, 1st, That the confession made through threats is not valid, and that made through torture or the rack must be afterwards ratified,<sup>11</sup> L. 5. tit. 13. P. 3. [L. 5. tit. 13. P. 3.] 2d, That being made through error, it may be revoked and proved before the suit is terminated,<sup>12</sup> L. 5. tit. 13. P. 3. [L. 5. tit. 13. P. 3.] 3d, That being contrary to nature, the laws, or not devolving on a thing certain, it is not valid, L. 6. tit. 13. P. 3. [L. 6. tit. 13. P. 3.] 4th, That the confession made extrajudicially is not valid, unless a reason or cause is assigned,<sup>13</sup> L. 7. tit. 13. P. 3. [L. 7. tit. 13. P. 3.] 5th, That only a person of twenty-five years of age, and the minor before his guardian not contradicting or opposing it, may make it; and the confession made by the attorney is valid only when no fraud or error is proved, L. 1. tit. 13. P. 3. [L. 1. tit. 13. P. 3.] 6th, That being lawfully made, the suit is put an end to by it, and it affords entire proof, L. 2. tit. 13. P. 3. [L. 2. tit. 13. P. 3.] 7th, That when one, who is questioned with regard to confession, is doubtful upon what he has to answer, he must have time allowed him<sup>14</sup> to reply or contest clearly, L. 3. tit. 13. P. 3. [L. 3. tit. 13. P. 3.] 8th, That the contumacy of the person questioned, on his confession being made obscurely, has the same effect as acknowledgment, L. 3. tit. 13. P. 3. [L. 3. tit. 13. P. 3.] 9th, That a copy (*traslado*) of all that is confessed ought to be given to the parties, in order that they may see on what they have to give proof, L. 4. tit. 7. lib. 4. Rec.<sup>15</sup> [L. 4. tit. 9. lib. 11. Nov. Rec.]

Cap. 4. Witnesses are men and women, such as cannot be excluded from giving testimony; whom the parties in the suit adduce to prove things denied or doubtful, L. 1. tit. 16. P. 3. [L. 1. tit. 16. P. 3.]

The reception or admission of witnesses is founded on these principles: 1st, That they be worthy of credit. 2d, That they be obliged

<sup>9</sup> Vide L. 4. tit. 13. P. 3.; and the qualifications laid down in L. 7. *ibid.*

<sup>10</sup> Its use in *Trinidad* is forbidden by the tenor of his Majesty's instructions to the governor, and the directions contained in the commissions of the judges: it was also abolished in Spain, by a decree of the Cortes.

<sup>11</sup> i. e. voluntarily. See note,<sup>10</sup> *ante*.

<sup>12</sup> i. e. before sentence.

<sup>13</sup> i. e. for the debt or thing acknowledged being due, &c.

<sup>14</sup> See how this is qualified by the law quoted.

<sup>15</sup> This relates to *posiciones*.

to give testimony. 3d, And this before the judge. 4th, That the faith to which their testimony is entitled, depends upon their numbers, their condition, attestations, and other indispensable circumstances.

As in so much, the witness is entitled to faith, as he will [ 278 ] and may clearly speak the truth, or in so far as he has no interest in the suit, it follows from the first principle: 1st, That persons of bad fame are incompetent to be witnesses (unless it be in a case of treason against the king or queen)<sup>16</sup> he who is proved guilty of falsehood or perjury (*probado de falso*); is *non compos mentis*; and the person infamous by reason of any of the abominable crimes expressed by L. s. tit. 16. P. 3. [L. 8. tit. 16. P. 3.] 2d, The person under twenty years of age in criminal causes, and fourteen in civil, who, after attaining their respective ages, may testify as to their remembrance of what happened before these ages, L. 9. tit. 16. P. 3. [L. 9. tit. 16. P. 3.] 3d, In a criminal suit the father or grandfather, the son or grandson, by reason of the reverence they bear each other, cannot be witnesses,<sup>17</sup> nor the prisoner, nor the strumpet, L. 10. tit. 16. P. 3. [L. 10. tit. 16. P. 3.]

The testimony of one who has an interest in the cause being liable to suspicion, it is inferred from this, 4th, That ascendants and descendants cannot be witnesses in each other's causes, unless to prove the age or kindred; but the father may be a witness to the military<sup>18</sup> will of his son who is a knight or military person, L. 14. tit. 16. P. 3. [L. 14. tit. 16. P. 3.] 5th, That the husband cannot give testimony in the cause of his wife, nor *vice versa*; nor the brother for the brother, while they both live under the power of their father,<sup>19</sup> L. 15. tit. 16. P. 3. [L. 15. tit. 16. P. 3.] 6th, Nor any one in his own cause; nor those of his family or household, as his overseer, servant, steward, intimate friend, &c.;<sup>20</sup> but the member of a corporate body or university may, in the cause of such corporation; because then the reason of interest ceases, L. 18. tit. 16. P. 3. [L. 18. tit. 16. P. 3.]

<sup>16</sup> And even in these cases their testimony must not be admitted, unless they shall have been first tortured, *vide* L. 8. tit. 16. P. 3.; and therefore, the testimony of all such persons may be considered excluded in all cases. See Append. Q. and F, as to the competency of witnesses, and as to evidence in general in respect to Trinidad.

<sup>17</sup> This only applied by the law quoted in the text to the *libertus* or slave emancipated, as with respect to his patron, the father, &c., of ditto: but the following law says, that ascendants, and descendants, and relations to the fourth degree, cannot be compelled to give testimony against one another, in suits relating to their persons, their fame, or character, or where the greater part of their property is at stake; nor the son-in-law, father-in-law, step-son, step-father, against one another, but the law adds, that if the above are willing to testify, they may do so.

<sup>18</sup> This is added from the law quoted in the text, which see. *Palacios* says, it should be L. 16. *ibid.*

<sup>19</sup> When brothers live away from their father, and separately, the law quoted in the text says, they may give testimony against each other; but it seems they may not in favor of one another. *Vide* L. 13. tit. 4. lib. 2., *Fuero Juzgo*; and L. 11. tit. 1. P. 6.

<sup>20</sup> See Order in Council, 8th June, 1816, making merchants' clerks competent witnesses in favor of their employers: also Order in Council, 16th September, 1822, civil court. Append. M. and Q.

7th, That the judge cannot be a witness in a cause of which he has cognisance;<sup>21</sup> nor the vendor with respect to a thing which he has sold; nor the advocate, attorney, or guardian, in causes which they shall defend in the name of their parties, unless they be produced or called by the opposite party, L. 19. and 20. tit. 16. P. 3. [L. 19 and 20. tit. 16. P. 3.] 8th, Nor a partner in a cause relative to the partnership, and which appertains equally to all; nor the accomplice of a crime against another accomplice, L. 21. tit. 16. P. 3. [L. 21. tit. 16. P. 3.] 9th, Nor the enemy of a person, for the causes<sup>22</sup> expressed by L. 22. tit. 16. P. 3. [L. 22. tit. 16. P. 3.]

Conformably with the second axiom, it is established, 1st, That the witness named by the party may be compelled by the judge to give evidence, L. 6. tit. 6. lib. 4. Rec.; [L. 1. tit. 11. lib. 11. Nov. Rec.] except it be a relation in the fourth degree, the son-in-law or father-in-law of him against whom the testimony is to be given in a [ 279 ] criminal case; but they may give it voluntarily, L. 11. tit. 16. P. 3.<sup>23</sup> [L. 11. tit. 16. P. 3.] 2d, That old persons,<sup>24</sup> honorable or respectable women, prelates, sick persons, knights (*caballeros*), or he who is actually employed for the king, cannot be compelled; for such are not obliged to come or appear before the judge or escribano, while thus prevented or circumstanced; but they are obliged to go and take the testimony of these persons at their own houses, L. 35. tit. 16. P. 3. [L. 35. tit. 16. P. 3.]

To the third principle belong the solemnities or forms of the reception of witnesses, which are reduced to the following: 1st, An oath must precede, unless the parties agree to the contrary, and citation to the opposite party to see the witness sworn, who, if he does not appear, does not, for this reason, prevent or delay the oath being received. The oath is also dispensed with, when the judge appoints any woman to examine whether another is pregnant, who demands possession of property in the name of one of whom she is with child, L. 23. tit. 16. P. 3. [L. 23. tit. 16. P. 3.] 2d, The witnesses must swear that they will speak the truth upon what they know of the fact, and will not discover their testimony to the parties, L. 24. tit. 16. P. 3. [L. 24. tit. 16. P. 3.]; but those received upon an inquest or inquiry (*pesquisa*) ought also to swear that they will tell what they have heard and think of the fact, L. 27. tit. 16. P. 3. [L. 27. tit. 16. P. 3.] 3d, Afterwards they are asked by the escribano of the cause the general questions set forth in L. 8. tit. 6. lib. 4. Rec. [L. 3. tit. 11. lib. 11. Nov. Rec.] 4th, To this succeeds the examination of each witness separately upon every point or question of the particular interrogatory, the answer and reason the witness shall give for seeing, hearing, knowing, or believing, if he were questioned about it, being noted; and, in a criminal cause, this reason may be given even after

<sup>21</sup> Which he has decided, or shall have to determine. *Vide* the law quoted in the text.

<sup>22</sup> See these causes of enmity which render a person incompetent.

<sup>23</sup> *Vide* notes 16, 17, 19 and 20. *ante*.

<sup>24</sup> The law quoted says, upwards of seventy years of age.

the testimony is received; this declaration of the witness ought to be read to him, in order that he may confirm it, Ll. 26. 28, 29. and 31. tit. 16. P. 3. [Ll. 26. 28, 29. 31. tit. 18. P. 3.] 5th, This examination in criminal<sup>25</sup> causes of weight or importance ought to be taken, by the judges themselves, Ll. 28. and 44. tit. 6. lib. 3. Rec. [L. 16. tit. 32. lib. 12. Nov. Rec.]; and if the witness is absent in another jurisdiction, he shall be examined by his own judge, under a commission from the judge of the other party, and the depositions shall be sent closed and sealed, as provided by L. 27. tit. 16. P. 3. [L. 27. tit. 16. P. 3.,] except in a criminal cause, of which the judge who has cognisance must himself examine the witness in whatever part he may be, L. 27. tit. 16. P. 3. [L. 27. tit. 16. P. 3.] 6th, After this act or proceeding (*fuera de este acto*), the witnesses cannot be interrogated, [280] unless in case of having mistaken the question, or given an equivocal answer (*á no haberse equivocado la pregunta*) or the judge desires the witness may explain any doubtful expression, L. 30. tit. 16. P. 3. [L. 30. tit. 16. P. 3.] 7th, The depositions or examinations must be received or taken after contestation of the suit, and not before, unless there be danger of the death or absence of the witnesses, in which case the opposite party is also cited; and if he be absent, he must be informed of it within a year after his return; but, in criminal causes, this previous examination, or *ad perpetuam rei memoriam*, does not take place, unless on a general inquest, *de oficio*,<sup>26</sup> Ll. 2. and 3. tit. 16. P. 3. [Ll. 2. and 3. tit. 16. P. 3.;] to which ought to be added the other cases expressed by Ll. 4, 5, 6, and 7. tit. 16. P. 3. [Ll. 4, 5, 6, and 7. tit. 16. P. 3.,] in which witnesses may be received before contestation.

The faith or credit of witnesses consisting in their number, condition, and other circumstances, it follows: 1st, That faith or credit is only caused or produced in a suit or trial by two witnesses; to prove payment, five<sup>27</sup> are required; to a testament, seven;<sup>28</sup> and if the testator is blind, eight, L. 32. tit. 16. P. 3. [L. 32. tit. 16. P. 3.] That the number of witnesses for each different question cannot exceed thirty; and the party may, leaving out as many as he wishes, substitute as many more,<sup>29</sup> the better to prove his case, L. 7. tit. 6. lib. 4. 3. Rec. [L. 2. tit. 11. lib. 11. Nov. Rec.] 2d, That the witnesses who shall disagree with respect to the thing, circumstances of place or time, do not avail, L. 28. tit. 16. P. 3. [L. 28. tit. 16. P. 3.] 3d,

<sup>25</sup> As also in civil. *Vide* the law quoted.

<sup>26</sup> On a general inquest (*pesquisa*), by order of the king. *Vide* the two laws quoted in the text.

<sup>27</sup> It is supposed that two are quite sufficient. *Palacios*, it appears, is also of this opinion; and he adds, various authors are so with reference to L. 2. tit. 21. lib. 4. Rec. (L. 1. tit. 28. lib. 11. Nov. Rec.)

<sup>28</sup> In Trinidad, by Order in Council, of 8th June, 1816, three male witnesses, domiciliated, and inhabitants of the place, are sufficient to a testament or last will. See Appendix M and Q.

<sup>29</sup> But this only in case the witnesses first presented shall not have been examined. *Vide* L. 2. tit. 11. lib. 11. Nov. Rec.

That the judges may confront the witnesses, if they shall find any variance between them, L. 56. tit. 5. lib. 2. Rec.<sup>30</sup> [L. 9. tit. 2. lib. 4. Nov. Rec.] 4th, That if both parties adduce proof by witnesses, it is seen which of them are most entitled to faith on account of their reputation, fitness, number, &c.; and in cases of equality<sup>31</sup> with respect to them, the defendant is acquitted,<sup>32</sup> L. 40. tit. 16. P. 3. [L. 40. tit. 16. P. 3.] 5th, That if the witnesses do not agree, those are to be believed who depose best to the fact;<sup>33</sup> and that the witness who contradicts himself in his declarations, is not entitled to faith, L. 41. tit. 16. P. 3. [L. 41. tit. 16. P. 3.] 6th, That the witnesses received before arbitrators (*árbitros*) may be again examined before the judge,<sup>34</sup> unless the parties have stipulated to the contrary, their testimony being valid<sup>35</sup> if they have died, L. 38. tit. 16. P. 3. [L. 38. tit. 16. P. 3.]

Cap. 5. An instrument of writing (*escritura*) is every deed that is made by the hand of a public escribano, or notary of a corporation or council (*concejo*), or sealed with the seal of the king, or other authorised persons, L. 1. tit. 18. P. 3. [L. 1. tit. 18. P. 3.] Hence arise the two kinds of instruments which produce faith and full [ 281 ] proof; one public, made by the escribano or notary, with the solemnities prescribed by Ll. 54. and 114. tit. 18. P. 3., 44, 45, 56.<sup>36</sup> and 47. tit. 25. lib. 4. Rec. [Ll. 54. and 114. tit. 18. P. 3. L. 1. tit. 23., Ll. 1, 2. and 4. tit. 24. lib. 10. Nov. Rec.,] and explained by *Pareja de Instrum. edict.* tit. 1. resol. 3. § 2. *á n.* 57. *al* 69.; another authentic (*auténtico*), which is that sealed by the king, bishops, prelates, and great men of the kingdom, L. 114. tit. 18. P. 3.

§ 1. Among public instruments are reckoned those which are made by escribanos of cabildo for things relating to them, L. 1. tit. 16. lib. 4. Rec. [L. 1. tit. 2. lib. 11. Nov. Rec.;] and those which are contained in public archives, and not of private persons, *Pareja*, *ibid.* tit. 1. resol. 3. and tit. 5. resol. 2. § 3. *á n.* 28. *al* 46., copies of which must come accompanied with the certificate of the keeper of the public archives (*han de venir acompañadas del archivero público*), who declares or certifies to have copied them by order of the

<sup>30</sup> Which is L. 9. tit. 2. lib. 4. Nov. Rec.; but which does not apply.

<sup>31</sup> The law cited in the text, to wit, L. 40. tit. 16. P. 3., says, the judge shall attend to those who testify the more credibly, and are of better character, although they may be fewer in number. But if they are equal with respect to the credibility of their sayings, the judge shall determine according to the majority of number, if they are equal in all things, he must acquit the defendant; because judges ought to be more ready to acquit than to condemn.

<sup>32</sup> See *Colom. de Escrib.*, tom. 1. in his *nota*, commencing p. 41., with respect to the examination of witnesses.

<sup>33</sup> This is not a clear exposition of the law quoted. Vide L. 41. tit. 16. P. 3., which says, that when the witnesses produced by the contending parties give contrary testimony, those are to be believed by the judge who appear to incline most to the truth, and whose declarations agree most with the fact, &c.

<sup>34</sup> By the opposite party.

<sup>35</sup> Saving the right of the opposite party to except (*tachar*) thereto.

<sup>36</sup> Not inserted in *Nov. Rec.*

king, or of the magistrate who may have authority to order it, L. 4. tit. 20. P. 3. and Ll. 2. and 4. tit. 15. lib. 2. Rec. [L. 4. tit. 20. P. 3. L. 4. tit. 13. lib. 4., E. 1. tit. 21. lib. 5. Nov. Rec.]

§ 2. A public instrument is divided into three classes; the original draft, register or protocol (*registro*), the original and the copy. The register is the original draft or writing, which is delivered, and remains in the possession of the escribano, which we also call protocol, by which doubts are determined that may be offered with respect to the instruments which are copied from it, [Ll. 8 and 9. tit. 19. P. 3., and Ll. 12. 13. and 16. tit. 25. lib. 4. Rec. [Ll. 8 and 9. tit. 19. P. 3. Ll. 1 and 4. tit. 23. lib. 10. Nov. Rec.]] The deed which is immediately copied from the protocol is the original which causes faith, inasmuch as it is authorised by the public escribano, before whom it passed, or by him to whom the protocols of the latter have passed, L. 14. tit. 23. lib. 4. Rec. [L. 6. tit. 33. lib. 5. Nov. Rec.;] but if another escribano copies it, with the authority of the judge and citation of the party, it is valid.

The *traslado* is called the copy which is taken from this original, which ought to be done with the same circumstances of the latter, L. 114. tit. 18. P. 3. [L. 114. tit. 18. P. 3.]

From what has been said these axioms result; 1st, That every public instrument must be signed by a public escribano of the appointed number of the towns (*de número de los pueblos*). 2d, That it does not produce faith, if devoid of any solemnity. 3d, That the weight or authority of a public instrument is derived among us from the protocol, because every instrument of writing (*escritura*) made without this is null, L. 13. tit. 25. lib. 4. Rec. [L. 1. tit. 23. lib. 10. Nov. Rec.] and L. 9. tit. 19. P. 3. [L. 9. tit. 19. P. 3.]

From the first axiom it is inferred, 1st, That if the party takes the exception that the instrument is not made by the hand of a notary, this throws the burthen of proof on the party who pro- [ 282 ] duces the instrument, L. 115. tit. 18. P. 3., [L. 115. tit. 18. P. 3.] except in the five cases expressed by *Pareja*, tit. 1. resol. 3. § 2. *á n.* 50. *al* 56. 2d, That the deed being made in a remote place is not entitled to faith, unless it is certified as to the signature, notarial signet, and legitimacy of the escribano, by two others of the appointed number, or by authority of the judge.<sup>37</sup> 3d, Neither is the instrument made by an ecclesiastical notary, in lay or profane causes, and of secular jurisdiction, entitled to faith, L. 32. tit. 3. lib. 1., and L. 19. tit. 25. lib. 4. Rec. [Ll. 5. and 2. tit. 14. lib. 2. Nov. Rec.] 3d, That if the escribano should say that the instrument is not his, he shall be believed, if the contrary be not proved; and if he should confess it, although the witnesses to the execution of the instrument deny it, he ought to be believed if he is of good character, and the instrument

<sup>37</sup> With respect to the form, execution, proof, &c., of deed, or written instruments, see Proclamation, 5th February, 1814, and Order in Council, 6th April, 1818, Append. O and P.



agrees with the register or protocol; but the contrary, if the escribano is of bad character, and the instrument made a short time, L. 115. tit. 18. P. 3. [L. 115. tit. 18. P. 3.]

On the second axiom, it is established, 1st, That the instruments or deeds in which are wanting the names of the contracting parties, the escribano, witnesses, signatures, signets, term of payment (*plazo*) day, month and year, and the matter upon which it hath been covenanted or delivered, are not valid or entitled to faith; or also, if any one of these parts is obliterated (*rota*), or cancelled, so that it cannot be understood, L. 111. tit. 18. P. 3. [L. 111. tit. 18. P. 3.]; but if the true meaning of the deed can be obtained, although it is obliterated in other parts which are not substantial, it will produce entire proof, L. 7. and 12. tit. 25. lib. 4. Rec. [L. 6. tit. 3. lib. 11., L. 6. tit. 23. lib. 10. Nov. Rec.] 2d, That the exception of the opposite party as to the falsehood of the deed, is admitted, and may be proved before the sentence, and even after it, before the judge of appeal, L. 116. tit. 18. P. 3. [L. 116. tit. 18. P. 3.] 3d, That the proof of this falsehood is allowed to be made by another instrument, or by what is equivalent, the proof of two<sup>38</sup> witnesses, L. 117. tit. 18. P. 3. [L. 117. tit. 18. P. 3.], and also by the comparison (*cotejo*), of deeds or instruments, L. 118. tit. 18. P. 3. [L. 118. tit. 18. P. 3.]; and exclusively of this case, proof by comparison of letters is not admitted, with respect to promissory notes (*vales*), and other private writings, L. 119. tit. 18. P. 3. [L. 119. tit. 18. P. 3.] Aut. 3. tit. 3. lib. 3. Rec. 39. [L. 1. tit. 3. lib. 3., L. 1. tit. 7. lib. 5. Nov. Rec.]

From the third axiom it follows: 1st, That the deed made by the same escribano who made the protocol will not produce faith without the assistance of the latter, *Pareja*, tit. 1. res. 3. § 1. *á* n. 9. *al* 34. 2d, That the instrument found in the possession of the party is not presumed the original. 3d, That the copy taken from a protocol spoiled or faulty (*viciado*), or wanting solemnities is null,<sup>40</sup> [283] *Pareja*, *ibid.* *á* n. 42. *al* 45. 4th, That in order to entitle the instrument to credit, without having relation to the protocol, it must be proved that the latter hath been lost, *Pareja*, *ibid.* *á* n. 47. 5th, That if there are two instruments which disagree with respect to the same thing, recourse must be had to the record or protocol to clear up the doubt, *Pareja*, *ibid.* n. 48. L. 9. tit. 19. P. 3. [L. 9. tit. 19. P. 3.] 6th, That the escribanos must not alter (*romper*) the protocol, although they may copy (*saquen*) the instruments in public form, L.

<sup>38</sup> That is, in case the alleged false instrument is not made by a public escribano, otherwise, L. 117. tit. 18. P. 3., quoted in the text, requires four witnesses. *Palacios* refers for information on this part of the text to *Curia Filipica*, p. 1. § 17. n. 35., and to *Murillo*, tit. *De Fide Instrum.*

<sup>39</sup> Aut. 3. tit. 2. lib. 3. Rec. is contained in L. 1. tit. 3. lib. 3. and L. 1. tit. 7. lib. 5. Nov. Rec.; but they do not apply.

<sup>40</sup> *Palacios*, referring to L. 1. tit. 25. lib. 4. Rec. [Vide L. 7. tit. 23. lib. 10. Nov. Rec.], says, that although a deed or instrument be null in all its parts, its contents may be proved by witnesses, or by any other legal mode.

12 and 13. tit. 25. lib. 4. Rec. [Ll. 6. and 1. tit. 23. lib. 10. Nov. Rec.] 7th, That the extract or copy an escribano hath drawn, without being asked, from the protocol which another made, is not proof, unless the authentic original be also shown, *Pareja*, tit. 1. resol. 3. § 3. 4 n. 3. *al* 13. This is not understood of the copy, which shall have been made by the same notary who has the custody of the protocol, *Pareja*, *ibid.* num. 20. *al* 24, but if the said copy should not have relation to the protocol, but to the instrument, it is not entitled to faith, *Pareja*, *ibid.* 4 num. 25. and 26., unless it be found in a public archive, *ibid.* num. 27. 8th, That copies made one hundred years before, the quality of the notary not being evident, nor in what year made, produce faith on account of the difficulty of proving the said quality, *Pareja*, *ibid.* n. 59. 9th, That whenever the copy of the instrument is observed to be taken by the notary without any solemnity, nor signature, in which case the antiquity does not produce faith, the presumption that it proceeds from this antiquity is destroyed by exhibiting the copy in which the requisites of a public deed do not appear to have concurred, *Pareja*, *ibid.* 4 num. 71. *al* 77; from whence some limitations are collected. 10th, That the copy of a copy does not cause faith amounting to proof, nor does it assist in proving, *Pareja*, tit. 1. resol. 3. § 4. 4 num. 1. *al* 7; observing the limitations in the following numbers. 11th, That the original instrument or copy duly taken (*legitimamente*) from the record or register, will not produce faith, if it does not set forth the escribano before whom it passed, and contain his rubrick or notarial flourish (*signo*),<sup>41</sup> L. 12. tit. 25. lib. 4. Rec. [L. 6. tit. 23. lib. 10. Nov. Rec.]

§ 3. Besides public and authentic instruments, there are others made or executed by a private hand, or that of a particular individual. Such are notes of hand or recognisances (*conocimientos*), orders or bills (*cédulas*), promissory notes (*vales*), acquittances (*apochas*), books of account, and other simple writings, which are only proof against those who make or execute them. From which it is inferred, [ 284 ] 1st, That a private writing is only proof when acknowledged by the party himself, or proved by two witnesses, present at its execution, who may declare in a suit or trial at law to have seen it made or executed,<sup>42</sup> and in no other way, L. 119. tit. 18. P. 3. [L. 119. tit. 18. P. 3.] 2d, That things written in memorandum books or registers (*cabrens*) do not afford proof against a third person; insomuch that if one about to die orders it to be written that a person is indebted to him ten maravedis, and his heirs prove there are twenty due, the writing is no impediment to them, L. 121. tit. 18. P. 3. [L. 121. tit. 18. P. 3.] 3d, That the books of merchants, which ought to be delivered to the receiver of royal rents whenever they require them,

<sup>41</sup> *Palacios* observes, that L. 12. tit. 25. lib. 4. (L. 6. tit. 23. lib. 10. Nov. Rec.) cited in the text, does not render the original instrument or copy null, by reason of the absence of the escribano's rubric (*signo*).

<sup>42</sup> Either by the party himself, or by his order. Vide the law quoted in the text, L. 119. tit. 18. P. 3.

are proof with respect to their merchandise, sales, &c.,<sup>43</sup> Ll. 23, 24, and 25. tit. 19. lib. 9. Rec.<sup>44</sup> 4th, That the original must be produced<sup>45</sup> by the party, and not the copy of the writing.

Cap. 6. The fifth species of proof is the evidence or manifestation of the fact (*evidencia de hecho*), or ocular or personal view or inspection (*vista de ojos*), which is made by the judge, or by his order, with respect to the limits or boundaries of towns, the pulling down houses that are in danger of falling,<sup>46</sup> personal injuries (*injurias*), the defloration of a virgin, and other similar things, Ll. 8. and 13. tit. 14. P. 3. [Ll. 8. and 13. tit. 14. P. 3.]

Cap. 7. The sixth species of proof is that by presumption or suspicion, which only takes place in the cases directed by L. 8. tit. 14. P. 3. [L. 8. tit. 14. P. 3.,] and those are, 1st, With regard to dominion or property; for he who proved the thing to have been his, or he to whom it hath been delivered, is presumed the owner until the contrary is proved, L. 10. tit. 14. P. 3. [L. 10. tit. 14. P. 3.] 2d, There is also a presumption in favor of the heir of the debtor who hath been released from the debt, unless the creditor prove that he did it through consideration or regard alone to the debtor, L. 11. tit. 14. P. 3. [L. 11. tit. 14. P. 3.] 3d, Suspensions afford no proof in criminal causes, unless where the husband hath prohibited or forbidden his wife to speak with another man, and meets them alone in a suspicious place, in which case he may call upon the judge for the infliction of the penalty of adultery, on account of vehement suspicion, L. 12. tit. 14. P. 3. [L. 12. tit. 14. P. 3.]

Cap. 8. There is another kind of proof which is called proof by fame, or notoriety, by which the death of an absent person is proved after ten years are passed, and in addition to this public report or fame, the country is distant; but if another sort of proof of the propinquity of the place where they say the party died can be adduced, [285] then the proof of mere report and fame ought not to be admitted, L. 14. tit. 14. P. 3. [L. 14. tit. 14. P. 3.] Lastly, Every thing appertaining to law (*derecho*) is proved by the law of the kingdom, and not by foreign law,<sup>47</sup> L. 15. tit. 14. P. 3. [L. 15. tit. 14. P. 3.]

<sup>43</sup> Vide Wood, C. L., book 4. c. 2. p. 312, 313., as to proof of books of account of merchants. See also Cur. Fil., lib. 2. Com. Ter., cap. 8. tit. Libros.

<sup>44</sup> Not in Nov. Rec.

<sup>45</sup> All original deeds, records, or *protocolos*, must be produced in the presence of or by the officers or persons to whose custody they are by law entrusted. *Palacios*, referring to L. 28. tit. 22. lib. 2., and 79. cap. 54. tit. 4. lib. 3., and Auto 4. tit. 11. lib. 2. Rec., (vide L. 15. tit. 10., and L. 11. tit. 28. lib. 11. Nov. Rec.) states to this effect: and adds, that private parties litigating may be compelled to produce in court, originals of deeds or writings in their possession, under a corresponding citation, or subpoena *duces tecum*, as the English lawyer would say.

<sup>46</sup> The word used in the text is simply "*edificios*;" but a reference to L. 13. tit. 14. P. 3., quoted, will show the translation conveys its meaning.

<sup>47</sup> Except in suits between foreigners relating to contracts made on property in a foreign country. Vide L. 15. tit. 14. P. 3., quoted in the text. *Palacios* adds, to the law cited in the text, a reference to L. 31. tit. 14. P. 5., L. 15. tit. 1. P. 1., and Auto 2. tit. 1. lib. 2. Rec. (Vide L. 11. and *notas* 2. and 3. tit. 2. lib. 3. Nov. Rec.)

Cap. 9. In order for the suit to be received for proof by any of the modes or kinds which we have explained, the judge assigns a certain term, which is called probatory, and in the space or period of time which the judge allows the parties to answer, or prove what is alleged in the suit when it hath been denied, L. 1. tit. 15. P. 3. [L. 1. tit. 15. P. 3.] Hence it is, 1st, That during this probatory term nothing new may be introduced or done in the suit, L. 2. tit. 15. P. 3. [L. 2. tit. 15. P. 3.] 2d, That this term is common to the plaintiff and defendant, Ll. 2. and 3. tit. 8. lib. 4. Rec.<sup>48</sup> [L. 2. tit. 12. and L. 3. tit. 3. lib. 11. Nov. Rec.] 3d, That it be conformable to what the law provides; that is, in suits within the ports (*puertos*) for eighty days, and beyond or without them for one hundred and twenty, L. 1. tit. 6. lib. 4. Rec. [L. 1. tit. 10. lib. 11. Nov. Rec.] 4th, That the term be peremptory, so that having expired, and publication made of the proofs, no more proofs can be received,<sup>49</sup> L. 5. tit. 6. lib. 4. Rec. [L. 9. tit. 11. lib. 11. Nov. Rec.,] unless the party be entitled to the privilege of *restitution*, which he must pray to prove within fifteen days after the term; and the period for which it is to be granted must be one-half of the term that was allowed for the principal or original proof: and, in this case, the penalty ordered by the judge is deposited, L. 3. tit. 8. lib. 4. Rec. [L. 3. tit. 13. lib. 11. Nov. Rec.] 5th, That if witnesses must be received who are beyond sea, six months are given, as an extraordinary term, the party swearing and naming the witnesses, and depositing the expenses; which term may be extended or shortened by the judge, according to distances and circumstances, L. 1. tit. 6. lib. 4. Rec.<sup>50</sup> [L. 3. tit. 10. lib. 11. Nov. Rec.] 6th, That this ultra-marine term must be prayed together or at the same time with the ordinary term, and not afterwards, L. 3. tit. 6. lib. 4. Rec. [L. 4. tit. 10. lib. 11. Nov. Rec.;] nor is it granted unless the party shall prove<sup>51</sup> that those witnesses were at the time in the place where the fact happened, L. 2. tit. 6. lib. 4. Rec. [L. 2. tit. 10. lib. 11. Nov. Rec.] 7th, That these same probatory terms run in criminal causes, L. 4. tit. 10. lib. 4. Rec.<sup>52</sup> 8th, That they may be granted three times; but in order for the second term to be granted, the necessity must be assigned and proved; and, for the third, it is necessary that evidence

<sup>48</sup> L. 2. tit. 12. lib. 11. Nov. Rec. does not appear to apply: the title of the law is "The mode of proposing exceptions (*tachas*) to witnesses, in order to their being admitted." L. 3. tit. 13. lib. 11. Nov. Rec. does seem to support the position, although the title of this law is "The time in which restitution in *integrum* must be demanded by privileged persons:" but *vide* on this law, being L. 3. tit. 8. lib. 4. Rec., *Azevedo*, num. 45. *et seq.*; and also the same author, on L. 1. tit. 6. lib. 4. Rec., (which is Ll. 1. and 3. tit. 10. lib. 11. Nov. Rec.) num. 5. p. 111.

<sup>49</sup> That is by witnesses. *Palacios* here observes, that proof, by deeds or instruments, is received under the oath prescribed by L. 1. tit. 2. lib. 4. Rec. (L. 1. tit. 3. lib. 11. Nov. Rec.,) after the publication of proof of witnesses, until the conclusion of the cause.

<sup>50</sup> Also *vide* L. 2. tit. 10. lib. 11. Nov. Rec. By L. 12. tit. 3. lib. 9. Rec., *de las Ind.*, if the proof required be from the Indies, the term is a year and a half for New Spain, two years for Peru, and three years for the Philippines.

<sup>51</sup> And that within thirty days. *Vide* L. 2. tit. 10. lib. 11. Nov. Rec., *ad fin.*

<sup>52</sup> Not in *Nov. Rec.*

be given of the impediment which prevented the party from adducing the proof in the second term, L. 3. tit. 15. P. 3.<sup>53</sup> [L. 3. tit. 15. P. 3.]

Cap. 10. The probatory term having expired, the party prays publication of proofs, and the allegations upon the proofs, or *bien pro-* [286] *budo*,<sup>54</sup> are made, the witnesses being objected to (*tachundose*) within six days; and if the objections shall appear conclusive, the judge decides that they be received for proof within a peremptory term, which must be half of that assigned for the principal proof; the judge not being able to shorten nor extend it,<sup>55</sup> nor to allow the privilege of restitution, in order to oppose objections (*tachas*) either in the first or second instance, L. 1. tit. 8. lib. 4. Rec. [L. 1. tit. 12. lib. 11. Nov. Rec.]; but it is to be observed, that the suit cannot be received for proof of *tachas*, after fifteen effectual days have elapsed,<sup>56</sup> L. 3. tit. 8. lib. 4. Rec. [L. 3. tit. 13. lib. 11. Nov. Rec.] Finally, if there be no publication of proofs, the suit is considered as concluded, if a *traslado*<sup>57</sup> be given, and the opposite party accused of contumacy.

Cap. 11. The proof with respect to the possession of nobility consists in the evidence of its possession by the litigant party, his father and grandfather, for a series of years, in places where they have lived; and if that of the grandfather was very ancient, it will be sufficient that the witnesses depose as to hearsay and public report. As regards the question of property, the sons or grandsons, &c. of those who have obtained letters patent (*executorias*), ought to appear within fifty days after being served with the order to contend with the fiscal of his majesty, according to what is directed with sufficient extension by Ll. 8. 14, 15, 16, 17. 27. 30. 33. 34, 35, 36. and 37. tit. 11. lib. 2. Rec. [Ll. 4. 6, 7, 8, 9. 11. 14. 12, 13. 15, 16, and 17. tit. 27. lib. 11. Nov. Rec.]

<sup>53</sup> The provisions of this law, as also of L. 23. tit. 16. P. 3., with respect to the granting three terms of proof, &c., are altered by L. 1. tit. 10. lib. 11. Nov. Rec., which fixes one peremptory term; and *vide* 1st *Cañado Jur. Civ.*, p. 96. n. 4—10.

<sup>54</sup> *Disceptatio causæ*.

<sup>55</sup> The judge may shorten but not extend it. *Palacios* (2).

<sup>56</sup> With respect to persons entitled to restitution *in integrum*, *vide* the law quoted in text.

<sup>57</sup> That is, of the petition of the party praying to the effect. *Vide* the law quoted in the text.

## TITLE VIII.

## OF SENTENCE.

CAP. 1. SENTENCE is the order or decree which the judge may [288] make with respect to any of the parties by reason of the suit which they prosecute before him, L. 1. tit. 22. P. 3. [L. 1. tit. 22. P. 3.] It is distinguished by interlocutory and definitive, the former is given upon a certain incidental matter of the suit, and not upon the principal demand; the latter is that which puts an end to the suit, absolving or condemning the defendant, L. 2. tit. 22. P. 3. [L. 2. tit. 22. P. 3.]; wherefore the first may be altered or amended before definitive sentence and may be given in writing or verbally, L. 2. tit. 22. P. 3. [L. 2. tit. 22. P. 3.] The second as an object of administration, is found to be established on the following principles. 1st, That the sentence must be given by the judge. 2d, That it must be conformable to law and to the proceedings. 3d, That by it an end is put to the suit. 4th, That once given it must be published and solemnly pronounced. [289] 5th, That having passed into a thing adjudged (*cosa juzgada*) it is firm and valid.

From the first principle it is inferred, 1st, That the sentence alone is valid which is given against a person subject to the jurisdiction of the judge, Ll. 12, and 15. tit. 22. P. 3. [Ll. 12, and 15. tit. 22. P. 3.] 2d, That it is not valid against a dead person, except in the case of treason, regarding the bad reputation of a person, &c., L. 15. tit. 22. P. 3. [L. 15. tit. 22. P. 3.] nor against a spiritual thing, a person under twenty-five years of age, one *non compos mentis*, &c., without their curator, except it were favorable, L. 12. tit. 22. P. 2. [L. 12. tit. 22. P. 3.] 3d, That if many judges be required to pass sentence or give judgment, it is not valid if one be absent, L. 17. tit. 22. and L. 4. tit. 26. P. 3. [L. 17. tit. 22. and L. 4. tit. 26. P. 3.] 4th, Nor if there be a disagreement with respect to acquittal, although in a criminal cause the judgment of those who acquit will avail,<sup>1</sup> L. 18. tit. 22. P. 3. [L. 18. tit. 22. P. 3.] 5th, That if the sentence should turn upon the determination of quantity, that given for the lesser sum will be valid,<sup>2</sup> because all agree upon that, L. 17. tit. 22. P. 3. [L. 17. tit. 22. P. 3.] 6th, That the sentence of him who cannot be a judge, or who has not authority to give it, is not valid, L. 12. tit. 22. P. 3. [L. 12. tit. 22. P. 3.] 7th, That if the judge entertain a doubt with respect to the decision, he may refer the cause to the Superior Court, citing the

<sup>1</sup> In favor of liberty, life, &c., but then the number in these cases must at least be equal, for the law quoted (L. 18.) says, that the plurality of opinions shall determine the question of acquittal or condemnation.

This also requires an equality of votes in the judges. Vide L. 17. tit. 22. P. 3. quoted.

parties, in which interval, if the judge who referred it hath given sentence, it will be valid, L. 11. tit. 22. P. 3. [L. 11. tit. 22. P. 3.]

From the second principle it follows, 1st, That the sentence given upon a thing not demanded or prayed for is not valid; and thus if a person demand generally a horse, and the judge points out or specifies one, it is not valid, L. 16. tit. 22. P. 3. [L. 16. tit. 22. P. 3.] 2d, That it must be conformable to the terms of the demand, and what is there alleged and proved, L. 16. tit. 22. P. 3. [L. 16. tit. 22. P. 3.] but sentence may be given without the whole truth appearing, in the cases expressed by L. 7. tit. 22. P. 3. [L. 7. tit. 22. P. 3.] and in these it is to be observed that the party is condemned in costs, if he was actuated by malice,<sup>3</sup> L. 8. tit. 22. P. 3. [L. 8. tit. 22. P. 3.] 3d, That the sentence against law, justice, or good manners is null, and there is no necessity for an appeal in order to set it aside,<sup>4</sup> Ll. 1, and 12. tit. 22. [Ll. 1. and 12. tit. 22.] and L. 3. tit. 26. P. 3. [L. 3. tit. 26. P. 3.] 4th, That the judges in giving sentence regard the truth which appears from the proceedings, and not the want of matters of form<sup>5</sup> and order of process or trial, L. 10. tit. 17. lib. 4. Rec. [L. 2. tit. 16. lib. 11. Nov. Rec.] 5th, That the inferior judges cannot have reporters (*relatores*); and must themselves see the proceedings, and not decide by the report of the escribano, unless the parties are present, L. 27. tit. 17. lib. 2. Rec.<sup>6</sup> L. 6. tit. 9. lib. 4. Rec. [L. 3. tit. 16. lib. 11. Nov. Rec.]

[ 290 ] From the third principle it is deduced, 1st, That the sentence must be certain and just, L. 3. tit. 22. P. 3. [L. 3. tit. 22. P. 3.] and thus the quantity must be expressed, or at least with relation to that which is written in the proceedings, L. 16. tit. 22. P. 3. [L. 16. tit. 22. P. 3.] 2d, That the party must be condemned or acquitted, L. 15. tit. 22. P. 3. [L. 15. tit. 22. P. 3.] 3d, That it is not valid when pronounced conditionally,<sup>7</sup> (*por condicion*), or on security (*fianzas*), L. 14. tit. 22. P. 3. [L. 14. tit. 22. P. 3.] 4th, That judges in giving sentence with respect to the condemnation of fruits (*frutos*), must estimate them, L. 52. tit. 5. lib. 2. [L. 6. tit. 16.] and L. 2. tit. 9. lib. Rec. 3. [L. 6. tit. 1. lib. 11. Nov. Rec.]

<sup>3</sup> The general rule as to costs is, that the vanquished party shall be condemned to pay them, unless he had just cause of litigating, the decision of which is at the discretion of the judge. Vide, as to costs, *Faria, add. ad. covarrub.* tom. 3. c. 27. p. 165., and particularly n. 1—11. 151. 3.—10. 28. 32; *Tratado de la Leg. de Esp. é Ind.* tit. 5. *Condenaciones*; *Febrero Ad.* tom. 6. p. 518, 519. n. 372. Ll. 39. 42, 43, and 45. tit. 2. L. 10. tit. 3. 8, 9, and 10. tit. 22. Part. 3., and tit. 19. lib. 11. Nov. Rec.; also *Curia, Fil.* p. 44. n. 5. and p. 48. n. 25. As to costs on appeal, vide L. 27. tit. 23. P. 3. *Greg. Lop.* gl. 3. *ibid.* and as to requiring security for costs where plaintiff has no real property in the jurisdiction, vide L. 41. tit. 2. Part. 3., also *Febrero, Adic.* tom. 3. p. 228. n. 20.

<sup>4</sup> *Quære.*

<sup>5</sup> But they attend to the want of matters of substance, such as want of citation, defect of proof, &c. *Palacios*, (2) to this effect.

<sup>6</sup> Not in *Nov. Rec.* *Palacios* says it should be L. 17. tit. 17. lib. 2. Rec. [L. 3. tit. 16. lib. 11. Nov. Rec.]

<sup>7</sup> *Palacios* says, it is valid, though the judge ought not so to pronounce it, if not appealed from, and will in such case pass into the authority of a case adjudged (*cosa juzgada*). If appealed from for the reason in question, the court of appeal may revoke it on such ground. The learned Professor refers to L. 14. tit. 22. P. 3. cited in the text.

On the fourth principle, it is established, 1st, That the definitive sentence ought to be pronounced,<sup>8</sup> on the petition of the party, within twenty days, and the interlocutory within six, under a penalty of fifty<sup>9</sup> *maravedis* to the exchequer (*camara*), and payment of costs<sup>10</sup> and damages, L. 1. tit. 17. lib. 4. Rec. [L. 1. tit. 16. lib. 11. Nov. Rec.] 2d, That before it is pronounced, citation should be made to the parties, to hear it within the time appointed by the judge; and if only one of them shall attend or obey, it shall be given in clear or intelligible words, and shall be read,<sup>11</sup> L. 5. tit. 22. P. 3. [L. 5. tit. 22. P. 3.] 3d, That although the plaintiff be absent, the term appointed for proof having expired, the judge may pronounce definitive sentence, according to the merits of the proceedings; and if this hath not expired, he may decide upon other points and costs, but not on the demand, so that the plaintiff afterwards appearing, shall be able to institute a new demand; but without availing himself of the proofs adduced in the first suit, L. 9. tit. 22. P. 3. [L. 9. tit. 22. P. 3.] 4th, That if the defendant does not obey, and the term hath expired, the judge gives sentence; and although he may absolve or acquit him, he shall pay the costs for his contumacy or default, L. 10. tit. 22. P. 3. [L. 10. tit. 22. P. 3.] 5th, That the sentence must be written, unless it be with respect to a cause of ten thousand *maravedis*, and under, which the judge shall be allowed to pronounce verbally, Ll. 6. and 12. tit. 22. P. 3. [Ll. 6. and 12. tit. 22. P. 3.]; and with respect to the mode in which *oidors* must vote and write their sentences, L. 42. *et seq.* tit. 5. lib. 2. Rec. treat. [L. 40. tit. 1. lib. 5. Nov. Rec.] 6th, That the sentence must be pronounced at a time not prohibited, and in a decent or proper place, L. 12. tit. 22. P. 3. [L. 12. tit. 22. P. 3.]

From the fifth principle, it arises, 1st, That the sentence may pass into a thing adjudged within sixty days, in which term the party may allege nullity, and from the sentence given thereon, a supplication or appeal<sup>12</sup> may be had, but the party is not allowed to allege nullity a second time; L. 2. tit. 17. lib. 4. Rec. [L. 1. tit. 18. lib. 11. Nov. Rec.] declaring that in suits of fifteen hundred *maravedis*, and the law of *Toro* that from sentences which shall be given [ 291 ] in the audiencias on revision (*á revista*), or from which there is no appeal, nullity cannot be alleged at any time; and that the nullity which shall be alleged against a sentence in a cause of first cognisance (*de vista*), or on revision (*revista*), from which there shall be a supplication in that of fifteen hundred (*de mille y quinientas*),

<sup>8</sup> After the conclusion of the proceedings or suit.

<sup>9</sup> Fifty thousand, according to L. 1. tit. 17. lib. 4. Rec. (L. 1. tit. 16. lib. 11. Nov. Rec.) *Palacios* (3).

<sup>10</sup> Which shall be doubled (*dobladas*), according to the law quoted.

<sup>11</sup> When this law was enacted, the lawgiver contemplated the possibility of a person being appointed a judge who could not read, or perhaps was blind; for it says, the sentence shall be read publicly by the judge if he can read; and if he does not know how, by some other person for him.

<sup>12</sup> As to appeal and the rules in respect thereto, see Append. T and Z, also Q.



must be treated of, or discussed together with the principal matter, L. 4. tit. 17. lib. 4. Rec. [L. 2. tit. 18. lib. 11. Nov. Rec.]

2d, That the above mentioned term having expired, the sentence cannot be revoked, unless it were given through false proofs, L. 13. tit. 22. P. 3. [L. 13. tit. 22. P. 3.]; in which case it may be revoked within twenty days,<sup>13</sup> after the expiration of which it becomes firm and irrevocable, L. 12. tit. 26. P. 3. [L. 12. tit. 26. P. 3.]

3d, That the sentence is revoked for being contrary to law, or for manifest nullity, and for want of formalities prescribed by law, Ll. 3, 4, and 5. tit. 26. P. 3. [Ll. 3, 4, 5, tit. 26. P. 3.]

4th, That it may be set aside on account of a fine being imposed on one who is not able to pay it, L. 4. tit. 22. P. 3. [L. 4. tit. 22. P. 3.]

5th, On account of restitution being demanded; which the attorneys or guardians of a minor may do, citing the opposite party; by power or force of which restitution, nothing is done or pursued in the cause: and if the suit commenced while the person was a minor, and sentence hath been given after his majority, restitution does not take place, L. 2. tit. 25. P. 3. [L. 2. tit. 25. P. 3.] This must be demanded before the judge who gave the sentence, or his superior, showing that there was error, and<sup>14</sup> that new proofs have been discovered, L. 3. tit. 25. P. 3. [L. 3. tit. 25. P. 3.]; and it must be granted, although the curators pursue the cause, if they did not appeal, L. 1. tit. 25. P. 3. [L. 1. tit. 25. P. 3.] But there is no restitution against sentences, from which no supplication lies, L. 11. tit. 17. lib. 4. Rec. [L. 5. tit. 13. lib. 11. Nov. Rec.]

6th, That the defendant being acquitted and declared free from the demand, this sentence cannot be revoked, unless a right to do so hath been reserved, L. 9. tit. 22. P. 3.<sup>15</sup>

Hence it follows, 7th, That no one can abrogate or reform the sentence, but the king; and if the judge has not decreed with respect to the costs and fruits, he may correct it within the day, and not afterwards, L. 3. tit. 21.<sup>16</sup> P. 3. [L. 3. tit. 22. P. 3.]

8th, That the sentence of arbitrators given against that of the judge, may be revoked, L. 4. tit. 22. lib. 4. Rec.<sup>17</sup>

9th, That the cause of nullity against the sentence must be conducted before the judge who gave it, although it be appealed from,<sup>18</sup>

<sup>13</sup> Read years.

<sup>14</sup> Or, according to *Palacios* and to L. 3. tit. 25. P. 3., cited in the text.

<sup>15</sup> This law does not apply. See the law cited which relates to the case of nonsuit, and regulates the payment of costs by plaintiff in bringing new suit or action. *Palacios* here observes that it is not intelligible whether the text means the demand or the sentence cannot be revoked. He also refers to the law there cited.

<sup>16</sup> Tit. 22. *Palacios* (1).

<sup>17</sup> This law is not inserted in the *Nov. Rec.* *Palacios* says, L. 4. tit. 21. lib. 4. (L. 4. tit. 17. lib. 11. Nov. Rec.) is meant.

<sup>18</sup> *Palacios* says, it must be before the judge of appeal, unless, as is stated in the text, the right should have been reserved to argue it before the judge who pronounced it; and that it is stated by *Canada, Inst. Prac. Juc. Civ. P. 2. C. 1.* to be most suitable for all parties to submit the nullity and the appeal together as principals, in order that they may

if the right of opposing the said exception hath been reserved to the party, L. 2. tit. 26. P. 3. [L. 2. tit. 26. P. 3.]

Cap. 2. The sentence then having passed into a thing [ 292 ] adjudged, 1st, It ought to be carried into execution within ten days, if it is with respect to a debt; and if with respect to dominion or in a criminal matter, without delay,<sup>19</sup> L. 5. tit. 27. P. 3. [L. 5. tit. 27. P. 3.,] so that no one can impede its execution under pain of losing his property, L. 8. tit. 17. lib. 4. Rec. [L. 2. tit. 17. lib. 11. Nov. Rec.]

2d, The same persons who gave the sentence, or their superiors, ought to order its fulfilment, and if the property was situate in another part, the fulfilment belongs to the judge of that jurisdiction, L. 1. tit. 17. lib. 4. Rec. [L. 1. tit. 16. lib. 11. Nov. Rec.]

3d, The sentence confirmed by the superior judge must be executed by the judge who gave it, L. 6. tit. 17. lib. 4. Rec. [L. 1. tit. 17. lib. 11. Nov. Rec.]

4th, If the condemnation comprehends the payment or performance of the entire debt or thing by many or several persons, it is executed on the property of either of them, and if it does not so, the execution must be levied on the property of all proportionably (*por partes*), L. 4. tit. 17. lib. 4. Rec. [L. 2. tit. 18. lib. 11. Nov. Rec.]

5th, The sentence given by arbitrators (*arbitros*), must be executed by the judge before whom execution shall be prayed, the judge acknowledging the legitimacy thereof, L. 4. tit. 21. lib. 4. Rec. [L. 4. tit. 17. lib. 11. Nov. Rec.]

be discussed and decided at the same time in the superior or appeal court. *Vide* Order in Council, 16th September, 1822, cl. 5. Appendix, appointing a new court for the trial of civil matters at Trinidad, adopting this course of procedure. App. Q.

<sup>19</sup> *Palacios* says, the judge may enlarge the time. He refers to L. 17. tit. 3. P. 3. L. 5. tit. 27. P. 3. and L. 31. *D. de re judicat.* and cap. 15. *extra eodem*, tit.

## TITLE IX.

## OF APPEAL AND SUPPLICATION.

[ 293 ] CAP. 1. IN order that parties may not receive prejudice through the malice or ignorance of judges, the remedy of appeal<sup>1</sup> hath been invented, which is the complaint that any of the parties prefers against the sentence or decision given against him, calling for and having recourse to the redress of the superior judge, L. 1. tit. 23. P. 3. [L. 1. tit. 23. P. 3.] On the nature of appeal, three principles are founded; 1st, That it must be interposed from an inferior to a superior judge. 2d, That those who feel themselves aggrieved, may appeal. 3d, That it must be lawfully interposed, conducted, and prosecuted. From the first principle it is inferred, 1st, That an appeal may be made from any of the ordinary and delegated judges, but not from the supreme tribunals, by reason of their excellence and superiority, L. 17. tit. 23. P. 3. [L. 17. tit. 23. P. 3.] Thus, therefore, according to our law, the appeal is from the ordinary judges to the audiences or chanceries of the districts in which they are established, L. 12. tit. 5. lib. 2. Rec. [L. 10. tit. 1. lib. 5. Nov. Rec.,] and from the ordinary judges of towns and incorporated places (*lugares de las ordenes*) to the corporate body or council thereof. Those which are interposed from the governor or lieutenant of Madrid, being of the mere amount of 1100 *maravedis*, go to the chamber or hall of appeals of the *alcaldes*, and may be carried to the council, if it should be judged fit, *Aut.* 3. tit. 18. lib. 4. [L. 21. tit. 20. lib. 11. Nov. Rec.]

Lastly, appeals in causes of ten thousand *maravedis* and under, in places where such custom shall exist, are carried to the *cabildo* of the place, who ought to appoint two *regidores*, in order that with the judge from whom the appeal is made, they may determine the cause within thirty days; so that these having expired, they have, notwithstanding, ten days more to decide according to the tenor of L. 7. tit. 18. lib. 4. Rec. [L. 8. tit. 20. lib. 11. Nov. Rec.]

2d, That the appeal must be interposed from the inferior judge to the immediate superior judge, or also before the superior tribunal, even in parts where there are lordships (*tierras de señorío*), Ll. 14. and 18. tit. 18. lib. 4. L. 1. tit. 1. lib. 4. Rec. [Ll. 7. and 8. tit. 20. lib. 11. and L. 1. tit. 1. lib. 4. Nov. Rec.,] although the appeal from arbitrators (*arbitros*) may be interposed before the inferior judge, or even before the prince, according to L. 4. tit. 21. lib. 8. Rec.,<sup>2</sup> which in this part alters L. 17. tit. 21. lib. 8. Rec.<sup>3</sup>

<sup>1</sup> See Append. T. and Z.

<sup>2</sup> This law is not inserted in *Nov. Rec.* *Palacios* says, L. 4. tit. 21. lib. 4. Rec. (L. 4. tit. 17. lib. 11. Nov. Rec.) is meant.

<sup>3</sup> This law is not in *Nov. Rec.*

3d, That the appeal from the delegated judge goes to the [ 294 ] one delegating him, L. 21. tit. 23. P. 3. [L. 21. tit. 23. P. 3.]

From the second principle, it is inferred, 1st, That all may appeal from the sentence who shall find themselves aggrieved by it, and those to whom prejudice results from it, and the guardian for his ward, &c., L. 2, 3, and 4. tit. 23. P. 3. [L. 2, 3, and 4. tit. 23. P. 3.]

2d, That the appeal interposed by one of the co-parties to a suit, profiteth the others comprehended in the same sentence, L. 5. tit. 23. P. 3. [L. 5. tit. 23. P. 3.]

3d, That the person in whose favor the sentence has been given, may appeal if he considers that it is not so complete and favorable as it should be, L. 9. tit. 23. P. 3. [L. 9. tit. 23. P. 3.]

4th, That if the sentence in a civil cause contains different divisions or points (*capítulos*), the appeal may be made from some of them leaving the others, and the like has place with respect to a sentence given in a criminal cause,<sup>4</sup> which may comprehend different offences and penalties, L. 14. tit. 23. P. 3. [L. 14. tit. 23. P. 3.]

5th, That an appeal may be interposed only from a definitive sentence, but not from an interlocutory one, unless it have the force of a definitive one, or also cause an irreparable injury and prejudice in the principal suit, such as the sentence for torture, &c., L. 13. tit. 23. P. 3. and L. 3. tit. 18. lib. 4. Rec. [L. 13. tit. 23. P. 3. and L. 23. tit. 20. lib. 11. Nov. Rec.]

The third principle embraces the following dispositions, according to Spanish jurisprudence. 1st, That in suits of four hundred<sup>5</sup> *maravedis*, and under, there is no appeal,<sup>6</sup> L. 19. tit. 9. lib. 3. Rec. [L. 8. tit. 3. lib. 11. Nov. Rec.] 2d, That it is not granted with respect to a thing which cannot be kept or preserved, and which does not admit an appeal, *ex. gr.* the appointment of a guardian, &c., L. 6. tit. 18. lib. 4. Rec. [L. 22. tit. 20. lib. 11. Nov. Rec.]

3d, That the judge who shall deny or refuse it,<sup>7</sup> shall pay thirty thousand *maravedis*, L. 13. tit. 18. lib. 4. Rec. [L. 24. tit. 20. lib. 11. Nov. Rec.]

4th, That the appeal may be interposed within five days after notification of the sentence, for otherwise it passes into or becomes a thing adjudged (*cosa juzgada*), L. 1. tit. 18. lib. 4. Recop. [L. 1. tit. 20.<sup>8</sup> lib. 11. Nov. Rec.]; but this rule admits of some exceptions. 1st,

<sup>4</sup> See Append. F.

<sup>5</sup> 1000 maravedis by L. 8. tit. 3. lib. 11. Nov. Rec.

<sup>6</sup> the same principle governs in summary decisions by the Complaint Court in Trinidad, in suits amounting to 1000 dollars. Vide Append. V, W, X.

<sup>7</sup> Except in suits relating to royal rents or revenues. Vide L. 24. tit. 20. lib. 11. Nov. Rec.

<sup>8</sup> And by this law the day of notification was included in the five days: but the proclamation of 19th of June, 1813, App. T. hath extended this period to fourteen days after sentence, which allows appeals in all civil causes from the inferior courts to the governor, provided the sum in dispute exceeds 200*l.* sterling; and from the sentence of the governor to H. M. in his privy council in like causes, where the sum in dispute exceeds 500*l.* sterling.

That minors, or those entitled to the same consideration or privilege, *ex. gr.* the fisc, churches, corporations, &c., claiming restitution,<sup>9</sup> may appeal until four years, Ll. 1. 8, 9, and 10. tit. 19. P. 6. [Ll. 1. 8, 9, and 10. tit. 19. P. 6.]

2d, That the term for appealing does not run against those occupied in the service of the king, or those who are in captivity, on a pilgrimage, at school or the university, or banished and detained by force,<sup>10</sup> until the impediment hath ceased or been removed, Ll. 10, 11, and 12. tit. 23. P. 3. [Ll. 10, 11, and 12, tit. 23. P. 3.]

[ 295 ] 3d, That from the sentence of arbitrators, the appeal must be made, or reduction prayed within ten days,<sup>11</sup> L. 23. tit. 4. P. 3. [L. 23. tit. 4. P. 3.]

4th, That immediately after the notification of the sentence, the appeal may be made by word or *viva voce*; but if any time hath elapsed, it must be made in writing; expressing the cause of appeal or injury, the sentence from, to, and against whom the appeal is made, and this before the judge who hath given the sentence; and, in his absence, before the escribano and witnesses, L. 22. tit. 23. P. 3. [L. 22. tit. 23. P. 3.]

6th, That the appeal has two effects; the one suspensive<sup>12</sup> (*suspensivo*), and the other devolutive (*devolutivo*): the first suspends the jurisdiction of the judge *à quo*; the second devolves the cognisance of the cause to the superior court; and thus an appeal interposed in a case prohibited by law, only produces the second effect, and not the first; for which reason the judge *à quo*, may, without exceeding his authority, proceed to the execution of the sentence, *Hevia, Cur. Filip.* p. 5. § 1. n. 19. and 20.

7th, That the appellant is bound to present himself in the state of appeal before the superior judge, and prosecute it within the time appointed by the judge *à quo*, or inferior court; and none being appointed by him, the period shall be forty days,<sup>13</sup> for beyond the port or city (*puertos*), and if within it, fifteen days; in which holy days, or days on which the tribunals are closed (*dias feriados*) are reckoned, Ll. 23. and 24. tit. 23. P. 3. and Ll. 2. and 15. tit. 18. lib. 4. Rec.;

<sup>9</sup> Restitution is the reducing a thing into its first state, where an appeal has been neglected. *Vide Wood, C. L. Ch. 3. book, 4. p. 321. and L. 1. tit. 19, P. 6.; and this privilege extends to four years after the minor hath attained to majority. Vide L. 8. tit. 19. P. 6.*

<sup>10</sup> There are causes of impediment which will entitle the party to this benefit; among them, sickness, &c. *Vide L. 12. tit. 23. P. 3.* But this benefit is granted with some qualification or limitation, as in the case where there is a proper representative of the party under power of attorney. *Vide Ll. 10. and 11. tit. 23. P. 3. quoted in the text.*

<sup>11</sup> *Vide L. 4. tit. 17. lib. 11. Nov. Rec.*

<sup>12</sup> The suspensive effect is the cognisance which the superior court takes of the sentence or decree of the judge *à quo*, or inferior court, suspending the execution of it. The devolutive is the cognisance which the superior court takes of the decree or sentence of the inferior, without suspending the execution of it. *Vide also Vol. 7. Febr. Adic. Part. 2. lib. 3. c. 1. § 13. p. 250. n. 489. Paz, Prax. tom. 1. p. 6. n. 11. and 12. p. 261.*

<sup>13</sup> The anterior law, *viz. L. 23. tit. 23. P. 3.* had made it two months.

[Ll. 23. and 24. tit. 23. P. 3. and L. 3. and 4. tit. 20. lib. 11. Nov. Rec.] and not doing so, the appeal remains deserted, and the sentence appealed from shall be valid,<sup>14</sup> L. 23. tit. 23. P. 3.

8th, That it is sufficient for the appellant to present himself with a certificate (*testimonio*) of the appeal, L. 10. tit. 18. lib. 4. Rec., [L. 18. tit. 20. lib. 11. Nov. Rec.] although L. 2. tit. 18. lib. 4. Rec. [L. 3. tit. 20. lib. 11. Nov. Rec.] says, that it must be with the whole process;<sup>15</sup> and this certificate must be set forth with all precision and clearness, L. 10. tit. 18. lib. 4. Rec. [L. 18. tit. 20. lib. 11. Nov. Rec.]

9th, That on presenting the certificate, an order or warrant (*compulsorio*) is given to transcribe a copy of the process at the cost of the appellant, *Pareja*, tit. 3. resol. 1. *á n.* 29. *al* 42., except in some cases, as in appeals to the cabildo, L. 7. tit. 18. lib. 4. Rec., [L. 8. tit. 20. lib. 11. Nov. Rec.] in that of L. 16. tit. 8. lib. 2. Rec., [L. 2. tit. 29. lib. 4. Nov. Rec.] in those of the *alcaldes*, and in that of L. 23. tit. 20. lib. 2. Rec. [L. 18. tit. 24. lib. 5. Nov. Rec.]

10th, That the appellant must pursue and finish the cause of appeal, or second instance, within a year from the time he hath appealed, L. 11. tit. 18. lib. 4. Rec.<sup>16</sup> [L. 5. tit. 20. lib. 11. Nov. Rec.]

11th, That the appeal being interposed, all that has been done by the judge *à quo* is revoked, and undone as null,<sup>17</sup> Ll. 26. and 27. tit. 23. P. 3. [Ll. 26. and 27. tit. 23. P. 3.]

12th, That in the second instance the parties may allege that which hath not been alleged, and give proof of that which hath not been proved; but proof is not admitted upon the same points, or [296] those directly opposite to those adduced in the first instance, L. 4. tit. 9. lib. 5. Rec. [L. 6. tit. 10. lib. 11. Nov. Rec.]; unless it be admitted by way of restitution; or if both parties themselves offer to prove; or if the witnesses presented in the first instance were not examined,<sup>18</sup> *Cur. Filip.* p. 5. § 3. n. 4.

<sup>14</sup> *Vide* to the same effect, L. 3. tit. 20. lib. 11. Nov. Rec.

<sup>15</sup> The fifth rule established by Court of Appeal, Trinidad, 16th Feb. 1814. directs "that in all civil causes of appeal where the same may be granted in the devolutive effect, the party appellant shall lodge in the tribunals an authenticated copy of the proceedings, and the sixth rule, "That in all civil causes of appeal in the suspensive effect; the original autos (or proceedings) will be delivered by the escribano of the respective ordinary tribunals to the escribano of the tribunal of appeal, the former certifying on the last page of the autos the whole number of pages contained therein. *Vide* Append. Z. and T."

<sup>16</sup> The year limited by this law for prosecuting and finishing the appeal, does not interfere with the provision of L. 3. tit. 20. lib. 11. Nov. Rec., which fixes the period for the presentation of the appeal to the superior court, and this last period is included in or reckoned as part of the year allowed by the law quoted in the text for the prosecution and completion of the appeal *Vide Azevedo* on L. 11. tit. 18. lib. 4. Rec. n. 3.

<sup>17</sup> All that is implied is, that the inferior judge shall do nothing new in the cause, nor with respect to that on which the sentence hath been given, pending the appeal. *Vide* L. 26. tit. 23. P. 3. and L. 27. *ibid.* does not seem to apply to the particular position in the text.

<sup>18</sup> The broad rule laid down in L. 6. tit. 10. lib. 11. Nov. Rec., excludes the admission of proof by witnesses upon the same points, or those directly opposite, upon which they have been adduced in the first instance, and limits the new proof on such, in the second instance, to authentic instruments or the confession of the party. By the law of the Far-

13th, That proof is received with respect to new exceptions which may be alleged in the second instance, and those which were not preferred in the first instance with due solemnity; and likewise those which, after publication of proofs made, the party shall swear have recently or since come to his knowledge; for which purpose half<sup>19</sup> of the term assigned in the cause is granted him, and restitution is also granted to those who are entitled to it, if they pray for it within fifteen days after publication, L. 5. tit. 9. lib. 4. Rec. [L. 7. tit. 10., and L. 4. tit. 13. lib. 11. Nov. Rec.]

14th, That the appellant must present his instrument at the same time with his appeal (*agravios*), in the same manner as is laid down with respect to the first instance; and the same is understood with respect to the respondent, except he hath discovered them recently or since, Ll. 1. 2. and 3. tit. 9. lib. 4. Rec. [Ll. 4. 5. and 6. tit. 21. lib. 11. Nov. Rec.]

15th, That, in the second instance, in order to conclude the suit, in whatever stage, only one petition of contumacy (*rebeldia*) is required, L. 51. tit. 4. lib. 2. Rec. [L. 2. tit. 15. lib. 11. Nov. Rec.]

16th, That if the party who hath felt himself aggrieved by the sentence, shall prove that he dared not appeal through great fear, or on account of the judge, the superior court ought to determine the cause conformably to justice, Ll. 23.<sup>20</sup> and 27. tit. 23. P. 3. [Ll. 23. and 27. tit. 23. P. 3.]

Cap. 2. It often happens that in causes which are depending before ecclesiastical judges, they deny or refuse appeals lawfully interposed; and as it belongs to the prince to repeal or remedy injuries (*fuerzas*) done by ecclesiastics, the party aggrieved may apply to the royal tribunals by way of protection, in order that, on sight of the proceedings, it may be declared whether the ecclesiastical judge has committed or not an injury (*fuerza*) in denying the appeal. This cognisance in no manner violates or infringes on ecclesiastical privileges; for, besides being extrajudicial, without touching on the subject of the cause, it is founded on a defence or protection which does not require jurisdiction, as *Salgado*,<sup>21</sup> p. 1. cap. 1. completely proves.

The practice with respect to this recourse is reduced to this, that [297] the complainant presents himself before the royal tribunal in the limits or jurisdiction of which the judge is who denies the appeal, L. 39. tit. 5. lib. 2. Rec. [L. 4. tit. 2. lib. 2. Nov. Rec.]; and it despatches its usual order (*carta ordinaria*), exhorting the judge to

<sup>18</sup> *ibid.*, L. 27. tit. 23. P. 3., new witnesses in such case were admitted, but this is altered by the subsequent law of the *Nov. Rec.* quoted.

<sup>19</sup> As regards this, L. 7. tit. 10. lib. 11. Nov. Rec. says, the term to be allowed shall be arbitrary, or at the discretion of the Court of Appeal, provided it does not exceed the term which was granted in the first instance.

<sup>20</sup> L. 23. tit. 27. P. 3. does not bear upon the point; but L. 27. *ibid.*, quoted, fully supports the position in the text.

<sup>21</sup> *De Regia protectione.*

defer to the appeal; but if he will not consent to do so, it issues a second order (*sobre carta*), commanding him to bring the original process; and if by that it shall appear that the appeal hath been lawfully interposed, the injury is redressed (*se alza la fuerza*); and it is decreed that the ecclesiastical judge restore to its original state all that has been done after the interposition of the appeal; but if it shall be perceived that there was no ground for the appeal, it is declared that no injury has been done, and the process is returned, with condemnation of costs, if the royal court shall see fit, in order that the judge may proceed to the execution of the sentence, L. 26. tit. 5. lib. 2. Rec.<sup>22</sup> [L. 28. tit. 1. lib. 5. Nov. Rec.]

Upon which it is worthy to be observed, 1st, That this recourse is not allowed in causes relating to the crusade (*crusada*), to subsidy (*subsidio*), and to the exemption from payment of tribute (*escusado*), Ld. 8. and 9. tit. 10. lib. 1. Rec. [Ll. 1. and 2. tit. 11. lib. 2. Nov. Rec.] neither in those of the inquisition, *Salgado*, Part. 1. cap. 2. § 5. n. 5., nor in those belonging to the conservators (*conservadores*) of the university of Salamanca, L. 18. tit. 7. lib. 1. Rec. [L. 2. tit. 6. lib. 8. Nov. Rec.]

2d, That the processes of visits of friars and monks ought not to be carried to the audiences, L. 40. tit. 5. lib. 2. Rec. [L. 9. tit. 2. lib. 2. Nov. Rec.]

3d, That this recourse or remedy belongs equally to the clergy and to the laity, as being founded on natural defence, *Salgado*, P. 1. cap. 2. 4 n. 49. *al* 63.

4th, That the consideration (*vista*) of the process in the royal tribunals is suspended until, by virtue of the second order or decree (*sobre carta*), the ecclesiastical judge may grant absolution, for which effect a third decree, or letter of request (*sobre carta de ruego*) is issued; for, if there be no evidence of the wrong, he cannot be compelled to repeal or remove the censures, *Salgado*, *ibid.* 4 n. 150. *al* 179.

5th, That the decrees of the tribunals on these applications are of five sorts: 1st, That by which it is declared that the ecclesiastic is guilty of the wrong. 2d, That by which the contrary is declared. 3d, Conditional, declaring that he has done the wrong in not hearing the party, or not admitting the proofs and exceptions, of which *Salgado*, P. 1. c. 5. treats. 4th, When it is said that the process does not come in the order and due term (*términos debidos*.) 5th, That by which it is declared that the process does not come in its proper state (*en estado*), which is, when it appears that the ordinary decree (*provision*) hath not been intimated to the judge. 6th, That the restoration or reposition (*reposicion*), which must be performed by the ecclesiastics, must be according to the excess (*aten-* [298] *tado*), whether it be by word or act; it being well understood that

<sup>22</sup> *Palacio* says, L. 38. tit. 5. lib. 2. Rec. (L. 2 tit. 2. lib. 2. Nov. Rec.)



he is bound only to replace or amend what he may have done contrary to law, *Salgado*, P. 1. cap. 2. *á* n. 2. *al* 13. and *á* n. 22. *al* 43.

7th, That from the restoration or amendment (*reposicion*), made by the ecclesiastic in virtue of the royal decree, there may be no appeal, L. 35. tit. 5. lib. 2. Rec. [L. 7. tit. 2. lib. 2. Nov. Rec.]

8th, That the not allowing the appeal, without the concurrence of any other wrong (*atentado*), is sufficient to constitute the commission of the grievance (*fuerza*) by the ecclesiastic, and to institute or try the recourse (*el recurso*), *Salgado*, P. 1. cap. 6. *á* n. 1. *al* 37.

9th, That what the ecclesiastic shall do after the ordinary decree is made known, and pending the recourse, is not an excess of his power (*atentado*); for this recourse being an extrajudicial act, it has no suspensive effect; *Salgado*, P. 1. cap. 7.

10th, That the appeal interposed on the contingency (*baxo condicion*), that the judge may cause such or such an injury (*agravio*), is of no force, although the injury may be proved, because it was null from its commencement; wherefore the ecclesiastic does not commit excess in not allowing the like appeals, *Salgado*, P. 2. cap. 2. n. 25, 26, and 27.

As in the cognisance of the plea of wrong, the canon law must be attended to, it is foreign to our object, and to the end of these institutes, to specify the individual cases in which the not allowing the appeal constitutes grievance (*fuerza*) in the ecclesiastic; the which may be seen fully treated of in *Salgado*, P. 2. from cap. 5. *ad fin.* and in Pp. 3 and 4.

Cap. 3. Although there is no appeal from the supreme tribunals, a supplication may be preferred before them; and this supplication is the pure effect of grace and favor of the prince, Tit. 24. P. 3., [Tit. 24. P. 3.,] and is founded on the following rules:

1st, That against the sentence delivered (*en vista de*) in the audiences, which confirms two correspondent or conformable sentences in succession given by inferior judges, a supplication is not admitted, for against three conformable sentences an appeal does not lie, L. 5. tit. 17 and L. 2. tit. 19. lib. 4. Rec. L. 25. tit. 23. P. 3. [L. 2. tit. 21. lib. 11. Nov. Rec. L. 25. tit. 23. P. 3.]

2d, That if two sentences of inferior courts are revoked in the *audiencia* a supplication lies, but not from the sentence confirmatory or revocatory, which shall be given on it upon revision (*revista*), L. 3. tit. 19. lib. 4. Rec. [L. 17. tit. 21. lib. 11. Nov. Rec.]

3d, That in suits commenced in the audiences, a supplication is admitted from the first sentence on the first trial (*de vista*), but not from [ 299 ] that on revision or the new trial, L. 2. tit. 19. lib. 4. Rec. [L. 2. tit. 21. lib. 11. Nov. Rec.]

4th, That supplication is not admitted from the decree, by which the alleged excess of the ecclesiastic is decreed on, nor yet from that which the audiences shall pronounce upon the question of their com-

petency as judges, L. 4. tit. 6. and L. 9. tit. 19. lib. 4. Rec.<sup>23</sup> [L. 7. tit. 21. lib. 11. Nov. Rec.]

5th, That from the sentence confirmatory of that of arbitrators there can be no supplication; but otherwise, if revocatory thereof, the execution levied on the sentence of the arbitrators remaining in force,<sup>24</sup> L. 4. tit. 21. lib. 4. Rec. [L. 4. tit. 17. lib. 11. Nov. Rec.]

6th, That from the sentences given in council in the stage of appeal from the *alcaldes* of court (*de corte*), there is no supplication, L. 10. tit. 4. lib. 2. Rec.; [L. 13. tit. 20. lib. 11. Nov. Rec.] nor in causes of *residencia*, L. 52. tit. 4. lib. 2. Rec., [L. 9. tit. 21. lib. 11. Nov. Rec.] except in the cases<sup>25</sup> laid down in Ll. 2. and 3. tit. 19. lib. 4. Rec. [L. 9 and 10. tit. 21. lib. 11. Nov. Rec.,] and others which the laws of the same title point out; nor from those in which the *oidores* declare as sufficient or not<sup>26</sup> the securities which the party shall give of 1500 *doblas*,<sup>27</sup> who is desirous to make his supplication.

8th, That from an interlocutory sentence,<sup>28</sup> the supplication must be preferred within three days without any restitution; and from a definitive one within ten days from that of the notification of the sentence, Ll. 1. and 4. tit. 19. lib. 4. Rec; [Ll. 1 and 3. tit. 21. lib. 11. Nov. Rec.]

9th, That the suit being determined by supplication, the party may be no further heard,<sup>29</sup> L. 3. tit. 19. lib. 4. Rec. [L. 17. tit. 21. lib. 11. Nov. Rec.]

The second supplication is, a revision of the process which the prince grants in certain causes, for which the party has no other remedy against the injury (*agravio*), received in the second instance, *Maldonado de secund. supplicat.* tit. 1. q. 1. n. 1. It is a remedy established by the law of Segovia.<sup>30</sup> All belonging to this one peculiar remedy is governed by the following principles:

1st, That this second supplication must be interposed before the royal person from definitive sentences of revision (*revista*), and not from interlocutory, although they have the force of such given by the councils and audiences in causes begun or originating there by new demand and not by way of appeal, restitution, nor any other manner, Ll. 1. 6. and 7. tit. 20. lib. 4. Rec. [Ll. 1. 4. and 14. tit. 22. lib. 11. Nov. Rec.] *Maldonado, ibid.* tit. 2, and 4. quest. 1. Whence we

<sup>23</sup> This law is not inserted in the *Nov. Rec.*

<sup>24</sup> That is, until the sentence on revision be given. *Vide* the law quoted in the text.

<sup>25</sup> Which are two: one, when the sentence is perpetual privation of the office of the judge complained of; and the other, when it condemns to corporal punishment.

<sup>26</sup> This translation of the text, though not literal, is supported by the law therein quoted, and appears to be the meaning thereof.

<sup>27</sup> An old Spanish gold coin, varying in value at different times: at one time, a *doble* was 490 *maravedis de Plata*, or fourteen *reals* and fourteen *maravedis de Plata*; at another, only 365 *maravedis*.

<sup>28</sup> Having the force of a definitive sentence is understood. *Palacios*, (4).

<sup>29</sup> Unless in the case where a second application is allowed. *Palacios*, referring to L. 3. tit. 19. lib. 4., cited (L. 17. tit. 21. lib. 11. Nov. Rec.).

<sup>30</sup> Ll. 1 and 2. tit. 21. lib. 11. Nov. Rec.

infer that the second supplication has place in causes which might be treated of in the council *de hacienda*, among private individuals (*particulares*), *Maldonado*, tit. 2. q. 7. n. 13., [Nota 2. tit. 10. lib. 6. and L. 17. tit. 22. lib. 11. Nov. Rec.] but not in causes regarding the royal rents, as laid down in L. 4. tit. 2. lib. 9. Rec.; likewise, that this remedy does not appertain to causes begun before the *alcaldes de corte*, because they are considered as ordinary judges, *Maldonado*, tit. 2. q. 3.

2d, A second supplication is not admitted in criminal causes with regard to the penalty, but it is in regard to the interest of the party, Ll. 3. and 11. tit. 20. lib. 4. Rec. [Ll. 10. and 13. tit. 22. lib. 11. Nov. Rec.]

3d, They must be arduous and important causes; so that if the question treated of shall relate to property or dominion (*propriedad*), its worth and value must be three thousand *doblas* of gold *de cabeza*;<sup>31</sup> and if the cause related to possession, the value of the property must amount to 6000 *doblas*, Ll. 1. and 9. tit. 20. lib. 4. Rec. [Ll. 1. and 6. tit. 22. lib. 11. Nov. Rec.]; but besides this it is required that the question treated of be principally that of possession, and that there be not two conformable sentences regarding it, L. 9. tit. 20. lib. 4. Rec. [L. 6. tit. 22. lib. 11. Nov. Rec.] But in order to estimate this value, attention must be had to the sentence condemnatory, and not to the time of the demand,<sup>32</sup> as *Maldonado*, Tit. 3. q. 1. á n. 15. *al fin*, proves.

4th, The second supplication must be interposed within twenty days from the period that the sentence hath been notified; and this term having elapsed, there is no restitution, Ll. 1. and 4. tit. 20. lib. 4. Rec. [Ll. 1. and 2. tit. 22. lib. 11. Nov. Rec.]

5th, He who interposes it must be obliged to give security to pay 1500 *doblas*, if the sentence shall be confirmed, the which are applied, in third parts, to the exchequer (*camara*), to the *oidores* who gave the sentence of revision (*revista*), and to the party who shall succeed, L. 1. tit. 20. lib. 4. Rec. [L. 1. tit. 22. lib. 11. Nov. Rec.] *Maldonado*, tit. 6. q. 14. num. 5. With respect to the form and deposit of the 1500 *doblas*, Ll. 6. and 7. tit. 20. lib. 4. Rec. [Ll. 1. and 2. tit. 23. lib. 11. Nov. Rec.] speak. If the person who shall prefer the supplication should be poor (that is, whose property does not amount to the value of three thousand *maravedis*), Ll. 20, 21. and 25. tit. 12. lib. 1. Rec. [Ll. 20. and 21. tit. 38. lib. 12. and L. 7. tit. 19. lib. 5.

<sup>31</sup> Each *doble* of gold *de cabeza*, was worth fifty-one *reales* and a half *de vellon*:\* as appears from what is said by *Cantos*, in his *Escrutinio de Monedas*, cap. 15. á num. 16. *al 20. Note in the Text.*

<sup>32</sup> At the time of the demand or action, and not of the sentence, allege *Paz, Prax.* tom. 1. p. 7. c. an. n. 75., and *Curia Filip.* p. 6. § 5. n. 5. *Palacios* (2).

\* *Palacios* observes, that this calculation does not agree with what is stated by *Maldonado de Secund. Sup.* tit. 9. quæst. 12. n. 12, 13, 14, and by *Dominguez, Illus. Cur. Filip.* tom. 1. part. 5. § 5. n. 5.; that according to the calculation of these two last, the 3000 *doblas* are not worth more than 42,797 *reales*.

Nov. Rec.,] it shall be sufficient that he give security on oath,<sup>32</sup> to pay them when he shall arrive at better fortune, *Salg. labyr. cred.* Part. 1. cap. *fin.* But the fiscal being the supplicant, he ought only to give security in 1000 *doblas*, L. 10. tit. 20. lib. 4. Rec. [L. 12. tit. 22. lib. 11. Nov. Rec.]

6th, The party supplicant may abandon this remedy within three months after he hath preferred the supplication without incurring the penalty, but not afterwards, so that the judges have not the [ 301 ] power to absolve him from it, L. 4. tit. 20. lib. 4. Rec. [L. 2. tit. 22. lib. 11. Nov. Rec.]

7th, No other proofs nor writings (*escritos*) are admitted,<sup>34</sup> L. 2. tit. 20. lib. 4. Rec. [L. 7. tit. 22. lib. 11. Nov. Rec.]

8th, The nullities of the sentence of revision (*revista*) must be treated of together with the principal cause, L. 4. tit. 20. lib. 4. Rec. [L. 2. tit. 22. lib. 11. Nov. Rec.]

9th, The supplicant must present himself before the royal person, within forty days from the period that he hath preferred the supplication, L. 4. tit. 20. lib. 4. Rec. [L. 2. tit. 22. lib. 11. Nov. Rec.] and immediately the king remits the cause to five of the council, in order that they may determine it, provided that if any should die or be removed, another must be named in his place, *Au.* 2. tit. 20. lib. 4. Rec,<sup>35</sup> which alters Ll. 1. and 11. tit. 20. lib. 4. Rec. [L. 13. tit. 22. lib. 11. Nov. Rec.]

10th, Those who were judges during the provisional possession of the estate (*de tenuta*) cannot be so in the second supplication, *Au.* 3. tit. 20. lib. 4. Rec.<sup>36</sup>

11th, If this supplication has not place by defect of the cause or by lapse of the term, the king in virtue of the sovereign power may grant it, L. 4. tit. 24. P. 3. [L. 4. tit. 24. P. 3.] *Maldonado*, tit. 6. quæst. 2.

12th, The supplicant is not excused from paying the penalty of 1500 *doblas*, if the sentence of revision (*revista*) hath been confirmed in the principal, although it be revoked or amended in any necessary point, also if this be of itself of so great value as to have admitted of a supplication, L. 3. tit. 20. lib. 4. Rec. [L. 10. tit. 22. lib. 11. Nov. Rec.]

<sup>32</sup> *Caucion juratoria.* *Palacios* observes, that the laws cited in the text do not specify any amount of property.

<sup>34</sup> *Palacios* says, that *Cañada*, *Inst.* P. 3. cap. 4. n. 32, states, he had frequently seen written instruments admitted in the council, on the party swearing and proving they had recently come to his knowledge, and that he could not have obtained the proof before, notwithstanding his diligence, provided they manifested the right and justice of the party.

<sup>35</sup> Not in *Nov. Rec.*

<sup>36</sup> Not in *Nov. Rec.*

## TITLE X.

## OF THE EXECUTIVE PROCESS OR MODE OF PROCEEDING (VIA EXECUTIVA).

[ 302 ] CAP. 1. THE executive process is that by which the cases or instruments which produce prompt execution *traen aparejada execucion*) are carried into effect, *Cur. Filip.* P. 2. § 1. n. 1.; and it having been introduced in favor of the plaintiff, although he shall have instituted his suit in the ordinary process, he may pursue the executive, which is not contrary or adverse, on paying the costs, as is inferred from L. 3. tit. 11. lib. 4. Rec. [L. 3. tit. 5. lib. 11. Nov. Rec.]; and, on the contrary, the executive process may be converted into the ordinary, when the justice of the plaintiff is manifest, and it hath not been pursued according to the order and solemnities prescribed by law, *Carleval, de judiciis*, tit. 2. disp. 8.

§ 1. The right to execution (*derecho de executar*) by means of the personal obligation which empowers justices to cause it to be executed (*garantigia*) is prescribed in ten years, L. 6. tit. 15. lib. 4. Rec. [L. 5. tit. 8. lib. 11. Nov. Rec.,] and that which arises from royal<sup>1</sup> right (*derecho real*) in thirty years, *Carleval*, tit. 3. disp. 4. n. 6.; but the decree of execution given upon a personal action is prescribed in twenty years, L. 6. tit. 15. lib. 4. Rec. [L. 5. tit. 8. lib. 11. Nov. Rec.] *Carleval, ibid.* á n. 7. al 12.

The right of execution in virtue of an instrument of rent or lease (*censo*) is prescribed in ten years, in regard to the annual charges due or past (*pensiones vencidas*), but not with respect to the future; because, in this kind of contract, the time is counted not from the commencement of the obligation, but from that of each year, *Carleval, ibid.* á n. 16. al 20.

§ 2. The things which carry with them prompt execution [ 303 ] are, 1st, The cédulas and ordinances (*provisiones*) of the king which are not contrary to law,<sup>2</sup> or given in prejudice of any one without being cited and heard, Ll. 1. 2. 3. and 4. tit. 14. lib. 4. Rec. [Ll. 2. 4. 5. and 3. tit. 4. lib. 3. Nov. Rec.]

2d, The sentence passed into a thing adjudged, from which there is no appeal, nor any other recourse; or if an appeal hath not been interposed and prosecuted in the terms of the law, L. 6. tit. 17. lib. 4. Ll. 6. and 11. tit. 18. lib. 4. Rec. [L. 1. tit. 17. lib. 11., and Ll. 22. and 25. tit. 20. lib. 11. Nov. Rec.,] and this rule comprehends also the award of arbitrators, L. 4. tit. 21. lib. 4. Rec. [L. 4. tit. 17. lib. 11. Nov. Rec.]

<sup>1</sup> That is with respect to the right of the crown.

<sup>2</sup> Natural or divine is understood. *Palacios*.

2d, The clear confession made before a competent judge both before and after contestation of the cause, L. 5. tit. 21. lib. 4. Rec. [L. 4. tit. 28. lib. 11. Nov. Rec.]

4th, The public or authentic instrument, although it may not contain the clause which empowers the justices to cause it to be executed (*guarantigia*), Ll. 1. and 2. tit. 21. lib. 4. Rec. [Ll. 3. and 1. tit. 28. lib. 11. Nov. Rec.,] and execution may even be made in virtue of a tacit obligation, and virtually comprehended in the instrument or deed which may carry execution with it; *ex. gr.* if in the instrument or deed relating to a portion or dowry (*dotal*), the husband confess the receipt of the dowry, although he is not expressly obliged to restore it, *Carleval*, tit. 3. disp. 5. *4 n.* 1. *al* 14. But the instrument which refers to another does not carry with it execution, unless it first appears that the latter does so; as neither does the instrument which is not liquidated in respect to the amount, damages, and interest, until it is liquidated with citation to the adverse party, *Cur. Filip.* § 8. n. 1. and 6. Whence it is inferred, that execution cannot issue for the capital placed in partnership until the accounts have passed; because, as it does not appear whether from such contract a loss or gain hath resulted, the amount is not liquidated; but from this rule *Carleval*, tit. 3. disp. 7. *4 n.* 6. *al fin*, draws five limitations.

5th, All instruments, promissory notes (*vales*), and writings acknowledged by the debtor, cause execution, L. 5. tit. 21. lib. 4. Rec. L. 4. tit. 28. lib. 11. Nov. Rec.]

6th, The orders of payment which are given by the king or council of revenue (*hacienda*) on the royal treasurers, carry with them prompt execution, because they are depositaries (*depositarios*), L. 14. tit. 7. lib. 9. Rec.<sup>3</sup>

For the same reason the orders of payment which are issued with the authority of the judge to pay a creditor money deposited carry with them prompt execution, *Carleval*, tit. 3. disp. 6. n. 2., and the authentic orders which corporations and universities give on their treasurers, who shall be bound to pay under the clause empowering the justices to cause execution to be made (*guarentigiamente*), *Carleval*, *ibid.* n. 5.

7th, Bills of exchange, after being accepted, as is referred to in<sup>4</sup> L. 9. tit. 16. lib. 9. Rec.;<sup>5</sup> and against the drawer, provided [ 304 ] they be protested, and he acknowledged them, *Carleval*, tit. 3. disp. 6. n. 23. In what manner the alternative obligation of doing something, or of paying a certain penalty, carries prompt execution with it is fully discussed by *Carleval*, tit. 3. disp. 3.

§ 3. Not only the creditor named in the instrument, which carries with it prompt execution, may demand execution, but also any other person who may have an interest, *Cur. Filip.* § 9. n. 1.; from which principle it follows: 1st, That the wife, after the dissolution of mar-

<sup>3</sup> Not in *Nov. Rec.*

<sup>4</sup> Vide L. 7. and 8. and n. 4. tit. 3. lib. 9. Nov. Rec.

<sup>5</sup> Not in *Nov. Rec.*

riage, may demand execution against the debtors of her husband for the debts contracted during it,<sup>7</sup> without previously having a cession or assignment of actions, L. 1. and 2. tit. 9. lib. 5. Rec. [L. 4. and 1. tit. 4. lib. 10. Nov. Rec.]

2d, That the husband may demand execution for the dowry (*dote*) promised, without a power or authority from the wife, which does not extend to her property called paraphernalia (*parafernales*) Cur. Filip. § 9. n. 5.

3d, That the assignee (*cesionario*) of the creditor may have execution (*executar*), provided the cession or assignment be just and real, Cur. Filip. *ibid.* n. 8.

4th, That each of the heirs<sup>8</sup> (of a testator or deceased person) may have execution for only the part or share which shall belong to him, Cur. Filip. *ibid.* n. 6.

§ 4. Execution takes place, or issues, 1st, Against the debtor and his heir, or person who shall appear to be such; provided, that if the latter hath accepted the inheritance with benefit of inventory, execution cannot go against him for more than the inheritance shall amount to; and that if there are many or several heirs, execution cannot go against each, *in solidum*, for all the debt, unless they should be possessors of property which the deceased hath mortgaged; because the *hypothecary* action always follows the thing mortgaged; but the one who, in this case, shall pay the debt *in solidum*, has his action to demand executively their proportions from the coheirs,<sup>9</sup> Cur. Filip. § 10. n. 4.; Vide Carleval, tit. 3. disp. 9.

2d, For the debts of a corporation (*consejo*), execution has place against their lands or estates (*propios*) and property Cur. Filip. § 10. num. 11.

3d, Execution proceeds or issues against the widow (*muger*) for a moiety of the debts contracted by the husband during matrimony,<sup>10</sup> Cur. Filip. *ibid.* n. 6.

4th, Execution has place against the child (*hijo*) preferred (*mejorado*), as to the third and fifth of the property of the father or mother for the part of the debt correspondent to his preference (*mejora*), L. 5. tit. 6. lib. 5. Rec. [L. 5. tit. 6. lib. 10. Nov. Rec.]

<sup>7</sup> It is stated in the author, quoted in the text, that also any other third person whose interest is treated of in the instrument, although he be not named in it, may demand execution thereof; and L. 1. tit. 28. lib. 11. Nov. Rec. is quoted in support; but the law quoted does not expressly state thus much.

<sup>8</sup> That is, as *ganancial* property, or that acquired during marriage by purchase, &c., and so considered; to half of which the wife, on the dissolution of marriage, is entitled: only for her moiety of such property, says Palacios.

<sup>9</sup> But all the heirs may join in the demand for execution.

<sup>10</sup> Under a cession or assignment of the right of action by the creditor.—Palacios (1).

<sup>11</sup> That is, with respect to *ganancial* property. Palacios confirms this opinion, and says it would only go against one moiety of such property, although the moiety of the debts might amount to more; and that as even any debt arising from a security entered into by the husband on behalf of another person, will not affect her individual property, under L. 7. tit. 3. lib. 5. Rec. (L. 2. tit. 11. lib. 10. Nov. Rec.); so neither would it affect her moiety of the *gananciales*. See Append. K.

5th, Execution has not place against the third possessor (*tercer poseedor*) of the property of the debtor, who, not being the heir [ 305 ] or successor, hath acquired it by special lawful title.<sup>11</sup> This rule is subject to three limitations;<sup>12</sup> 1st, if the debtor hath alienated (*enagén*) his property, or part of it, the executive process having begun, or been instituted, to evade the right of the creditor. 2d, If the instrument in which the thing was mortgaged contain the covenant not to alienate.

3d, If the instrument contains the clause of being constituted precarious tenant or possessor at will (*clausas de precurio y constituto*), *Carleval*, tit. 3. *disp.* 11. 4th, This rule is not understood of third possessors, such as the depositary (*depositario*), borrower (*comodatario*), the husband in respect of dotal property, &c., *Cur. Filip.* § 11. n. 4. and 6.

§ 5. The form and order of the executive process is as follows: 1st, The plaintiff presents his petition before the judge, who has jurisdiction over the defendant, praying execution in virtue of the instrument which he presents, in which he shall swear to the true and liquidated sum due to him, L. 2. and 19. tit. 21. lib. 4. Rec.<sup>13</sup> [L. 1. and 12. tit. 28. lib. 11. Nov. Rec.], and if the debt should be payable at a certain term (*plazo*), he cannot prefer his demand before it shall arrive, L. 2. tit. 21. lib. 4. Rec. [L. 1. tit. 28. lib. 11. Nov. Rec.]

2d, If the defendant against whom execution is issued (*executado*) should have submitted himself to the jurisdiction of the *alcaldes* of the court (*corte*) and royal audiences, with the renunciation of his own jurisdiction (*fuero*), these tribunals may proceed to levy the execution, provided the person and property of the debtor be found within five leagues, and if beyond this distance, they shall proceed by warrant (*requisitoria*) to levy the execution, and if the submission hath been made to the ordinary judges, they may cause execution to be levied on the property of the debtor within their jurisdiction, L. 20. tit. 21. lib. 4. Rec. [L. 7. tit. 29. lib. 11. Nov. Rec.]

3d, The instrument being examined by the judge before whom it is presented, and found to carry with it prompt execution, he orders it to issue without taking security from the creditor except in certain cases, L. 2. and 19. tit. 20. lib. 4. and L. 40. tit. 4. lib. 3. Rec. [L. 1. and 12. tit. 28. lib. 11. and L. 12. tit. 30. lib. 11. Nov. Rec.]

<sup>11</sup> That is, a *bonâ fide* possessor by purchase, &c., or claiming under such possessor, &c.

<sup>12</sup> *Palacio* says, that thirteen limitations are mentioned by *Febrero Reformado*, P. 2. lib. 3. cap. 2. num. 82.

<sup>13</sup> Neither of these laws requires the creditor to make oath to the amount of the sum justly due to him previously to obtaining the writ of execution; but L. 6. tit. 28. lib. 11. Nov. Rec. (L. 9. tit. 21. lib. 4. Rec.) commands the judge to perform this duty before he shall grant the writ of execution to the creditor.

The exaction of this salutary measure hath been made the subject of a rule of the new Court of First Instance of Civil Jurisdiction at Trinidad, established under the Order in Council of 16th September, 1822, Appendix Q. See the rules at length, Appendix R.



4th, The order or writ of execution is delivered to the creditor,<sup>14</sup> in order that he may have it executed, otherwise there is a nullity, L. 17. tit. 21. lib. 4. Rec. [L. 10. tit. 28. lib. 11. Nov. Rec.,] observing that the escribano must note (*hacer constar*) the hour in which the execution is delivered (*se traba*), L. 21. tit. 21. lib. 4. Rec. [L. 14. tit. 30. lib. 11. Nov. Rec.]

§ 6. Execution is issued against a certain and determinate property which the debtor points out, and not doing so, or being absent, against that which the creditor shall point out, *Cur. Filip.* § 15. n. 1 and 2. Execution must first be levied on movable property, and in default of that on real; and not being so levied, it shall be null, L. 19. tit. 21. lib. 4. Rec.<sup>15</sup> [L. 12. tit. 28. lib. 11. Nov. Rec.]

[ 306 ] The property levied on must be sequestered, inventoried, and deposited with a person of stability or property (*abonada*), L. 7. tit. 21. lib. 4. Rec. [L. 1. tit. 30. lib. 11. Nov. Rec.]

There are some kinds of property which cannot be taken in execution, and these are, 1st, Things sacred and destined for divine worship, L. 7. tit. 2. lib. 1. Rec. [L. 3. tit. 5. lib. 11. Nov. Rec.]

2d, Implements and beasts of husbandry, and the bread which laborers shall bake by their own labors, except for royal duties (*derechos*), or for tithes, and ecclesiastical and seignorial rents, L. 25, 26.<sup>16</sup> and 28. tit. 21. lib. 4. Rec. [L. 15. tit. 31. lib. 11., L. 6. tit. 11. lib. 10., L. 16. tit. 31. lib. 11., L. 7. tit. 11. lib. 10. and L. 8.<sup>17</sup> tit. 19. lib. 7. Nov. Rec.]

3d, The tools which artificers possess for the exercise of their trade or calling, *Cur. Filip.* § 16. n. 10.

4th, The houses, arms, and horses of knights (*caballeros*), and noblemen (*hijosdalgo*), except for a debt to the crown,<sup>18</sup> L. 6. tit. 17.

<sup>14</sup> By an Order in Council, 16th September, 1822, reciting the law quoted in the text, it is declared, that writs of execution shall not, in any future case, be deliverable to the parties, but shall be delivered by the *escribano* (the secondary or register of the court,) to the *alguacil mayor* (the sheriff or marshal), upon the application of the party in whose favor the judgment shall have been obtained. See Appendix Aa.

<sup>15</sup> Neither L. 19. tit. 21. lib. 4. Rec. (L. 12. tit. 28. lib. 11. Nov. Rec.) nor any other law, declares the execution expressly null in this case; if, therefore, the defendant should tacitly approve it; that is, by not appealing, nor praying it a nullity, before proceeding to any other act or step in the cause, the understanding is, that such execution will be valid. — *Palacios*, (1).

<sup>16</sup> Not in *Nov. Rec.*

<sup>17</sup> This law (L. 8. tit. 19. lib. 7. Nov. Rec.), does not particularly apply; but it is the latter part of it which forms with L. 16. tit. 31. lib. 11., and L. 7. tit. 11. lib. 10. Nov. Rec., the whole of L. 28. tit. 21. lib. 4. Rec., which is quoted in the text.

<sup>18</sup> Although, according to various laws, execution ought not to be levied, except for debts due to the crown, on the dwelling houses, arms, horses and mules in the possession and use of knights and nobles (*caballeros é hijosdalgo*), such rule is only observed in respect to the dwelling houses; and even then, in default of other property, execution is levied on them; for it is not just that the creditor should remain without the payment of the debt, which, in justice and conscience, is due to him. — *Febrero Reformado*, P. 2. lib. 3. cap. 2. § 2. num. 98. *Palacios*, who makes this quotation, observes, that neither L. 6. tit. 17. lib. 5.; nor L. 27. tit. 21. lib. 4. Rec.; (L. 13. tit. 31. lib. 11. Nov. Rec.), prohibit execution going against the dwelling house of the noble; but L. 61. tit. 4. lib. 2. Rec.; [which is not inserted in the *Nov. Rec.*] He adds, that at no time of the year ought

lib. 5. and L. 27. tit. 21. lib. 4. Rec. [L. 13. tit. 31. lib. 11. Nov. Rec.]

5th, Mares destined for the breed of horses of a particular breed (*caballos de casta*), L. 2. cap. 6. and L. 3. cap. 4. tit. 17. lib. 6. Rec.<sup>19</sup> [Ll. 2 and 3. tit. 29. lib. 7. Nov. Rec.]

6th, The books of advocates and students, *Cur. Filip.* § 16. num. 8.<sup>20</sup>

7th, The pay of military persons, L. 3. tit. 27. P. 3. [L. 3. tit. 27. P. 3.]

8th, Beds, wearing apparel, and other things necessary for daily use,<sup>21</sup> *Cur. Filip.* § 16. num. 19.

9th, Foreign ships, or ships from foreign parts,<sup>22</sup> with merchandise, unless the debtors should point them out to be levied on, L. 12. tit. 17. lib. 5. Rec. [L. 4. tit. 31. lib. 11. Nov. Rec.]

10th, Things destined for the public use, nor the property<sup>23</sup> (*proprias*) of the inhabitants (*vecinos*) cannot be taken in execution for the debts of the corporation (*concejo*), L. 7. tit. 17. lib. 5. and L. 16. tit. 21. lib. 4. Rec. [L. 1. tit. 30. lib. 11. and L. 2. tit. 20. lib. 7. Nov. Rec.]

11th, Execution may be levied on the property (*propriedad*) of the thing subject to a right (*servidumbre*), L. 8. tit. 32. P. 3.<sup>24</sup>

12th, For the debts contracted by the husband before or during marriage, only the fruits of the dotal property, which shall be left after having satisfied the burthen or charges (*cargas*) of matrimony, may be taken in execution, for the contrary would be in prejudice of the wife,<sup>25</sup> *Carleval*, tit. 3. disp. 19. á n. 2. al 9.; but if the wife hath contracted the debt before marriage, the dotal property may be taken in execution in default of paraphernalia (*parafernales*), and not the fruits, which belong to the husband, *Carleval*, *ibid.* á n. 9. al 12. If the wife hath contracted a lawful debt during marriage, execution

execution to be levied on the mules, oxen, nor other beasts of the plough or agriculture, belonging to husbandmen, farmers, or agriculturists (*labradores*), L. 25. tit. 21. lib. 4.; Ll. 5 and 6. tit. 17. lib. 5. Rec.; (L. 15. tit. 31. lib. 11.; and L. 6. tit. 11. lib. 10.; Ll. 12. and 13. tit. 31. lib. 11. Nov. Rec.) The Learned Professor does not notice the exceptions from this exemption in respect to debts due by such persons to the court, or for taxes; and for rent of the land to the proprietor. See the laws of the *Nov. Rec.* cited, particularly of tit. 31. lib. 11. *Labradores* were, it will be seen, peculiarly protected. The exemptions in these and other laws, in favor of particular persons, are repealed by Order in Council, 16th September, 1822, Appendix J.; which see.

<sup>19</sup> Not in the *Nov. Rec.*

<sup>20</sup> See Order in Council, 16th September, 1822, Appendix J, making them liable.

<sup>21</sup> See Order in Council, 16th September, 1822, Appendix J.

<sup>22</sup> That is, for debts due to persons of the country whence such ships come; but *quere*, if not for debts contracted on account of such ships, or of the owners, in the ports they come to?

<sup>23</sup> This appears to mean, from reference to L. 2. tit. 20. lib. 7. Nov. Rec., only the bread or grain deposited in the public granaries: and the other law quoted in the text, viz. L. 2. tit. 30. lib. 11. Nov. Rec., does not bear upon the subject.

<sup>24</sup> This is an erroneous quotation.

<sup>25</sup> *Palacios* refers to *Carleval*, cited in the text, for an understanding thereof.

See Order in Council, 16th September, 1822, Appendix K, containing provisions in respect to the property of married women.

cannot go against her dotal property (*dote*), in prejudice of the husband, *Carleval, ibid. á n. 12. al 19.*, and much less if the debt were common to both, because then execution must be levied on property [ 307 ] common to both (*bienes comunes*), *Carleval, ibid. á n. 19 al fin.*

The debtor who will not give security, or bail of *saneamiento*, ought to be imprisoned (*preso*),<sup>26</sup> L. 19. tit. 21. lib. 4. Rec. [L. 12. tit. 28. lib. 11. Nov. Rec.] There are some persons who enjoy the privilege of being exempt from arrest or imprisonment for debt,<sup>27</sup> and these are, 1st, He who should have possessed for three whole years twelve mares of a particular breed (*de casta*), L. 2. c. 4. tit. 17. lib. 6. Rec. [L. 2. tit. 20. lib. 7. Nov. Rec.]

2d, The attorneys of towns (*pueblos*) who are in the court, Ll. 10. and 11. tit. 7. lib. 6. Rec. [L. 5. tit. 8. lib. 3. and L. 8. tit. 31. lib. 11. Nov. Rec.]

3d, Nobles and their descendants, or persons entitled to the privileges of nobility (*hijosdalgo*), L. 4. tit. 2. lib. 6. Rec. [L. 2. tit. 2. lib. 6. Nov. Rec.,] provided the debt does not proceed from crime or *quasi* crime, L. 6. tit. 2. lib. 6. Rec. [L. 10. tit. 2. lib. 6. Nov. Rec.]

4th, Doctors and licentiates of the higher degree (*en facultad mayor*), Ll. 8 and 9. tit. 7. lib. 1. Rec. [Ll. 14 and 15. tit. 18. lib. 6. Nov. Rec.]

5th, Laborers in the time of crop or harvest, or the labor of the field, except for debts to the crown, or proceeding from crime, Ll. 25 and 26.<sup>28</sup> tit. 21. lib. 4. Rec. [L. 15. tit. 31. lib. 11., L. 6. tit. 11. lib. 10. Nov. Rec.]

6th, A woman<sup>29</sup> (*muger*) cannot be imprisoned (*presa*) for a debt of any nature, L. 8. tit. 1. lib. 5. Rec. [L. 3. tit. 5. lib. 10. Nov. Rec.]

§ 7. As the end or object of the execution is to cause payment to be made to the creditor, it is necessary to sell the property levied on at public auction; to which effect, being real, three proclamations or public outcries (*pregones*)<sup>30</sup> must be made in twenty-seven days, each in nine days; being movable or personal, three proclamations are made from three to three days, L. 19. tit. 21. lib. 4. Rec. [L. 12. tit. 28. lib. 11. Nov. Rec.]

The first of these proclamations is made in the place or domicile of the defendant in execution (*executado*), and all the three in the place or court where the trial is had, L. 36. tit. 4. lib. 3. Rec. [L. 13. tit.

<sup>26</sup> The law (L. 12. tit. 28. lib. 11. Nov. Rec.), cited, says, the writ of execution directs execution to be levied on personal, and in default, on real property; the debtor giving security for their sufficiency to satisfy the debt (*saneamiento*); and, in default of such security, orders the arrest and imprisonment of the debtor, unless privileged therefrom. *Palacios* observes to this effect.

<sup>27</sup> See the limitation of this exemption to the persons mentioned in the proviso or exception contained in the Order in Council, 16th September, 1822, Appendix J.

<sup>28</sup> Not inserted in *Nov. Rec.* See Order in Council, 16th September, 1822, Appendix J.

<sup>29</sup> Limited to married women, by Order in Council, 16th September, 1822, Appendix J.

<sup>30</sup> These proclamations, or *pregones*, were done away with in Trinidad, by proclamation 12th May, 1815. See Appendix Bb.

28. lib. 11. Nov. Rec.]; and the debtor may renounce the proclamations and their terms, *Cur. Filip.* § 18. num. 8.

The execution being made or levied, and the term of the proclamations expired, the debtor must be cited to the sale (*remate*), in order that within three days he may either pay the debt or allege his exceptions, L. 19. tit. 21. lib. 4. Rec. [L. 12. tit. 28. lib. 11. Nov. Rec.], and if the execution shall be amended or extended (*se mejorar*), or made anew on other property, it is necessary to cite again the debtor to the sale (*remate*) of it, *Cur. Filip.* § 19. num. 4.

In the before mentioned term of three days, the debtor must make his opposition, alleging whatever exceptions he may have; and in order to prove them, the term of ten days is granted him, which are reckoned from the day of opposition, in which he must present his documents (*escrituras*), and witnesses, Ll. 2. and 3. tit. 21. lib. 4. Rec. [Ll. 1 and 2. tit. 28. lib. 11. Nov. Rec.] And it is to be observed, that against contracts, sentences, and compromises (*com-* [ 308 ] *promisos*), which carry with them prompt execution, no exception is admitted, except payment by the debtor, an agreement not to sue or demand, an exception of falsehood or deceit (*falsedad*), usury, fear, force, and other lawful exceptions, L. 1. tit. 21. lib. 4. Rec. [L. 3. tit. 28. lib. 11. Nov. Rec.] A sight, or *traslado*, of the opposition of the debtor, is given to the creditor, and the term of ten days allowed him to produce or make his proof, Ll. 2. and 3. tit. 21. lib. 4. Rec. [Ll. 1. and 2. tit. 28. lib. 11. Nov. Rec.], and the said term may be prorogued at the instance of the creditor, by reason of the executive process being for his benefit, *Cur. Filip.* § 20. num. 4.

Cap. 2. In whatever time or stage of the executive cause, even after the sentence of sale (*remate*), provided that payment hath not been made, nor possession given of the property, the opposition of the third opposer (*tercero opositor*), who presents himself claiming the dominion of the property levied on, or the preference of the debt, must be admitted, L. 41. tit. 4. lib. 3. Rec. [L. 16. tit. 28. lib. 11. Nov. Rec.] provided this opposition be not malicious, directed to retard the execution, *Cur. Filip.* § 26. num. 5. With respect to which we say, 1st, That the question of dominion being clear (*constando del dominio*), a stop must be put to the execution, *Cur. Filip. ibid.* num. 10.

2d, That if this third opposer should claim to be anterior to the person at whose suit execution is made (*executante*), and to compete with him the executive process, the execution must be stayed or suspended until by the ordinary process it be determined which of the two creditors ought to be preferred, as *Carleval*, tit. 3. disp. 12. proves, and if the opposers be many, the rules of preference established or laid down in Tit. 11. cap. 3. § 2. lib. 2. shall be observed.

3d, That a sight or *traslado*, of the opposition of the third person is given to the defendant in execution (*executado*), and to the plaintiff at whose suit it is levied, (*executante*); proof is received if necessary, and the cause is carried on between them by the ordinary process, *Cur. Filip. ibid.* num. 12.

Cap. 3. The term of citation having expired, if no opposition should have been made, or having been made after the term of it, the judge without any other citation, or delay, decides the cause of sale, annulling the execution, or ordering it to proceed until sale take place, and payment be made to the party, L. 19. tit. 21. lib. 4. Rec. [L. 12. tit. 28. lib. 11. Nov. Rec.,] provided the creditor gives the security of the law of Toledo; this is, that in case of the execution being revoked by the superior judge or court, he will restore that which he received in payment, L. 2. tit. 21. lib. 4. Rec. [L. 1. tit. 28. lib. 11. Nov. Recop.]

§ 1. The appeal from the sentence of sale (*remate*), has only the devolutive effect, and therefore it ought to be executed, notwithstanding such appeal, or any nullity whatsoever, which shall be [ 309 ] alleged, except it be notorious, and result from the same proceedings, Ll. 3. and 19. tit. 21. lib. 4. Rec. [Ll. 2. and 12. tit. 28. lib. 11. Nov. Rec.]

§ 2. After the sentence<sup>31</sup> they proceed to make the sale or adjudication of the property; which is sold at public auction (*almoneda*) to the person offering the best bid and terms (*comprador de mejor postura y condicion*), *Cur. Filip. § 22. n. 1.*

From which principle it results, 1st, That the offer of the second bidder being accepted, the first is discharged, and not otherwise, *Cur. Filip. ibid. n. 6.*

2d, That when the order conformable to justice and due solemnity hath not been observed at the public sale or auction, the sale is reopened and bids are received, *Cur. Filip. ibid. n. 7.*

3d, That after the sale is made or closed, no bid is admitted, *ibid. n. 8.*, except with respect to the property of minors, or those to whom restitution is granted, *ibid. n. 10.*

4th, That there being no purchaser, the creditor may require that the property be delivered to him in payment, estimating it at what it might be worth, for otherwise<sup>32</sup> he is not entitled to purchase it, L. 6. tit. 27. P. 3. *Cur. Filip. ibid. n. 23.*

5th, That if fraud, or *dole* hath intervened in the sale of the property levied on, the debtor has his action for the restoration of it, on returning or giving the price, *ibid. n. 21.*

6th, That from the value of the property, payment must be made of the principal and costs; and not being sufficient, an execution or compulsory order (*mandamiento de apremio*), is issued against the debtor, and his bail of *saneamiento*, *ibid. n. 13.*

In the executive suit, the debtor must pay to the officer of justice

<sup>31</sup> Add, of sale (*remate*). For the due understanding of the present regulations in Trinidad, in respect to the forms of proceeding in civil suits, to the sale of property under execution, and to other matters connected with the subject of this book, the reader must refer, in addition to what has been before stated in the course of the notes by the Translator, to the Appendix. See Q, R, Mm, S, Cc, Dd, Ee, Ff, Gg, Hh, Ii, Jj, Kk, Ll.

<sup>32</sup> Vide what is said with respect to the ability of the creditor to purchase: 6th Febr., ad. p. 2. lib. 3. 2. § 5. n. 329. 345, 346, 347; commencing p. 498.

who shall execute the writ of execution, the tenth part (*decima*) of the amount of the debt, in places where a custom should exist to pay this fee,<sup>33</sup> L. 7. tit. 21. lib. 4. Rec. [L. 1. tit. 30. lib. 11. Nov. Rec.] without being able to exact others, L. 12. tit. 21. lib. 4. Rec. [L. 4. tit. 30. lib. 11. Nov. Rec.] Upon which it is to be observed, 1st, That the *decima* or fee is not due until sixty-two hours after the execution hath been levied, L. 30. tit. 21. lib. 4. Rec. [L. 17. tit. 30. lib. 11. Nov. Rec.]

2d, That it is not due on debts to the crown or *fisc*, but at the rate of thirty *maravedis* for a thousand, L. 8. tit. 21. lib. 4. Rec.<sup>34</sup> [L. 1. tit. 30. lib. 11. Nov. Rec.]

3d, That the *decima* or fee cannot be exacted until the creditor be declared satisfied and paid, L. 7. tit. 21. and L. 31.<sup>35</sup> tit. 4. lib. 4. Rec. [Ll. 14, 15 and 16. tit. 30. lib. 11. Nov. Rec.]

4th, That there is no *decima* or fee, if the debtor shall pay [ 310 ] within twenty-four hours after the execution is made, or shall deposit the amount, Ll. 21, 22 and 23. tit. 21. L. 4. Rec. [L. 15. tit. 30. lib. 11. Nov. Rec.] and he is also in this case discharged or relieved from the costs of the escribano, L. 22. tit. 21. lib. 4. Rec.

5th, That if any dispute should arise whether the debtor had paid or not within the twenty-four hours, and the hour should not have been noted by the escribano, the latter must pay the costs.

<sup>33</sup> The fees of the sheriff or marshal (*alguacil mayor*), are regulated in Trinidad by docket.

<sup>34</sup> This law is not inserted in *Nov. Rec.*

<sup>35</sup> Not inserted in *Nov. Rec.* *Palacios* says, it should be L. 31. tit. 4. lib. 3. Rec. (L. 7. tit. 30. lib. 11. Nov. Rec.): which law says, in addition to the text, the *decima* shall not be paid if the parties agree or arrange the suit.

## TITLE XI.

## OF CRIMINAL TRIALS OR PROSECUTIONS.

CAP. 1. HAVING already explained the mode of proceeding in civil suits it now only remains for us to expound what particularly and differently belongs to criminal trials; wherefore we shall take care not to repeat any of those things which they have in common, and which therefore are already treated of.

A criminal trial is that in which the cognisance and punishment of a crime committed are treated of.

The proceeding to the punishment and investigation of crimes is, either by accusation of the party, or by inquisition (*pesquisa*) arising from denunciation, or from the office of the judge (*de proprio officio*), L. 6. tit. 1. lib. 8. Rec. [L. 2. tit. 34. lib. 12. Nov. Rec.]

§ 1. Accusation is the charge which one man prefers against another before the judge, charging an offence which he alleges the accused hath committed, and praying the infliction on him of punishment for it, L. 1. tit. 1. P. 7. [L. 1. tit. 1. P. 7.] It is considered with reference to the following axioms: 1st, That only they can accuse who have a motive or an interest (*entienden*) in the accusation; those who can strike terror (*aterrar*) into the delinquent; those who by accusing, do not act against piety, and those who are in no manner of suspicious character (*sospechosos*.)

2d, That all can be accused who are capable of offending and suffering punishment.

[ 311 ] 3d, That the calumnious or false accusation does not remain unpunished.

From the first principle it is inferred, 1st, That a woman<sup>1</sup> cannot accuse, nor a minor of fourteen years of age, nor a person of bad character, nor the perjured, nor one bribed or suborned (*cohechado*); he who has two accusations pending cannot in the mean time prefer a third, nor can a person of very great poverty accuse, nor the accomplice in the crime, nor can a relation or servant accuse a relation in the line of ascendants,<sup>2</sup> or being a brother, unless it were for the crime

<sup>1</sup> On the contrary, those who cannot strike or cause terror, says, *Palacios*; and that one of the reasons assigned by *Greg. Lop.*, Gl. 5. L. 2. tit. 1. P. 7. for a judge being prohibited to be an accuser, is, because he might produce this effect on the accused. A better reason for such exclusion is, that the judge ought not to be the accuser. The learned Professor also observes, that the language of the law is, every person may be an accuser who is not prohibited by the laws, L. 2. tit. 1. P. 7. For information as to the constitution of the criminal courts, and the mode of proceeding in criminal trials, in Trinidad, the reader is referred to the Appendix F.

<sup>2</sup> A woman, observes *Palacios*, may accuse for the murder of her husband, as also the husband for the murder of his wife, L. 14. tit. 8. P. 7.

<sup>3</sup> Or descendants, adds *Palacios*.

of high treason (*læse majestatis*), or for a crime committed against their relations in the fourth degree, fathers-in-law, sons-in-law, or step-brothers, L. 2. tit. 1. P. 7. [L. 2. tit. 1. P. 7.]

2d, Neither can he accuse who has another accusation pending against him<sup>4</sup> until his trial be concluded, unless it be for a crime against his person, or that of any of those relations in the degree we have mentioned; but if he should be condemned to perpetual banishment, he can at no time accuse another, unless for an offence against his relations,<sup>5</sup> which his accuser hath committed,<sup>6</sup> L. 4. tit. 1. P. 7. [L. 4. tit. 1. P. 7.]

3d, That no judge can accuse, but may give information to the king of offences committed in the places of his jurisdiction, Ll. 2. and 5. tit. 1. P. 7. [Ll. 2. and 5. tit. 1. P. 7.]

4th, That when several accuse a person of the same crime, the judge ought to select from the accusers him whom he understands to proceed with the best intention, L. 13. tit. 1. P. 7. [L. 13. tit. 1. P. 7.]

5th, That any one may accuse or charge with respect to a crime committed against his person, or to the injury of another, except the crime of adultery, not having the consent of the husband, L. 2. tit. 19. lib. 8. Rec. [L. 4. tit. 26. lib. 12. Nov. Rec.]

From the second axiom it follows,

1st, That persons deceased cannot be accused, unless it be for the crime of high treason, or against the public, or of heresy, or for having misapplied the property of the crown,<sup>7</sup> L. 7. tit. 1. P. 7. [L. 7. tit. 1. P. 7.]

2d, That also every judge who may have aggrieved<sup>8</sup> a party accused before him, may be accused even after death; also the sacrilegious thief, and the woman who attempts the death of her husband,<sup>9</sup> because all these ought, by reason of their crimes, to suffer in their property the punishment which cannot be inflicted on their bodies, L. 8. tit. 1. P. 7. [L. 8. tit. 1. P. 7.]

3d, Persons under fourteen years of age cannot be ac- [ 312 ] cused,<sup>10</sup> unless for crimes of blood, death, theft, and others of a like nature, being above ten years and a half old, in which last case the

<sup>4</sup> A person, says *Palacios*, referring to L. 4. tit. 1. P. 7.; and *Greg. Lop.*, Gl. thereupon, who has an accusation pending against him, cannot accuse another of a crime of less or equal degree to that of which himself is accused.

<sup>5</sup> Or against himself, adds *Palacios*.

<sup>6</sup> This exception does not appear to be, to the extent, or in the manner put in the text, supported by the law of the 7th Part. referred to; which would only seem to permit the accusation, when the sentence for banishment was temporary, and not perpetual; and then without any qualification or limitation as to persons against whom the offence might be committed.

<sup>7</sup> This seems to apply only to persons charged with the administration, receipt, custody, &c. of property of the crown.

<sup>8</sup> *Ex. gr.* through bribery, &c.

<sup>9</sup> A trial commenced against a wife, under such a charge, who may happen to die during its progress, may be concluded, and sentence given, declaring her infamous in case the offence be proved—*Palacios*, referring to L. 8. tit. 1. P. 7., cited in the text.

<sup>10</sup> The offences, observes *Palacios*, referring to L. 9. tit. 1. P. 7., of which persons under fourteen cannot be accused, are those relating to carnal excesses (*de luxuria*).



punishment must be lessened with respect to them, L. 9. tit. 1. L. 17. tit. 14. and L. 8. tit. 31. P. 7. [L. 9. tit. 1. L. 17. tit. 14. and L. 8. tit. 31. P. 7.]

4th, Nor madmen, &c., L. 9. tit. 1. P. 7. [L. 9. tit. 1. P. 7.]

5th, Neither can judges, while in office, be accused, except for a crime committed by reason of their station or employment, L. 11. tit. 1. P. 7. [L. 11. tit. 1. P. 7.]

6th, Nor can any one who has once been accused be a second time accused of the same offence of which he hath been acquitted, except in the second accusation it be proved that the first was carried on with fraud or deceit (*dolo*); or the first having been prosecuted by a stranger, the second should be preferred by a relation, who proves that he was ignorant of the first, L. 12. tit. 1. P. 7. [L. 12. tit. 1. P. 7.]

From the third principle it is inferred,

1st, That the accusation ought to be made in writing, setting forth the name of the accuser, that of the accused, that of the judge before whom the accusation is preferred, specifying the crime, the place, year, and month in which it was committed; and the judge must inscribe the day on which he receives it, and make the accuser take the oath of calumny,<sup>11</sup> L. 14. tit. 1. P. 7. [L. 14. tit. 1. P. 7.]

2d, That he who shall accuse through calumny or falsely, ought to suffer the punishment<sup>12</sup> of the accused, L. 26. tit. 1. P. 7. [L. 26. tit. 1. P. 7.] But there are certain persons in whom, although they may not prove the accusation, it can only be considered presumptive, and not evident calumny; for which reason our laws exempt them from this punishment. Such are,<sup>13</sup> 1st, The guardian<sup>14</sup> of an orphan. 2d, He who accuses one of being a false coiner. 3d, The heir who follows up the accusation which the testator announced in his lifetime<sup>15</sup> against a determinate person for having attempted his death. 4th, He who accuses with respect to an act committed against himself. 5th, He who accuses on account of the death of his relations in the fourth degree. 6th, And the husband and wife on account of the death of each other, Ll. 6. 20, 21, and 26. tit. 1. P. 7. [Ll. 6. 20, 21, and 26. tit. 1. P. 7.]

From the fourth principle we deduce, 1st, That the judge of the place where the accused committed the offence, or of that where he shall be accused, is the competent judge, when once submission shall be made to his jurisdiction by the medium of contestation, or the judge of the domicile of the accused, or of the place where he shall have the greater part of his property, L. 15. tit. 1. P. 7. [L. 15. tit. 1. P. 7.]

<sup>11</sup> And the accused being cited, the accusation is passed to him: and twenty days allowed him to answer. *Vide* L. 14. tit. 1. P. 7., quoted in the text.

<sup>12</sup> *Vide* persons excepted by the law. *Vide* relations, &c.

<sup>13</sup> Such persons, says *Pelacios*, are excused from the punishment of presumptive calumny, which is, when the accuser does not prove the accusation; but not from the punishment of evident calumny, which is, when it is proved that he made it maliciously. He refers to *Greg. Lop.* Gl. 5., L. 6. tit. 20. P. 7., cited; and to *Curia Filip.*, p. 3. § 8.

<sup>14</sup> Unless he be proved to have accused through malice. *Vide* L. 6. tit. 1. P. 7.

<sup>15</sup> Or mentions in his will, L. 21. tit. 1. P. 7. *Vide* the law.

2d, That if the same person hath committed two crimes, the judge who first takes cognisance ought to substantiate or establish the cause, and afterwards transmit it to the other who demands it, *Cur. Filip.* P. 3. § 4. n. 6.

3d, That if the judge in whose jurisdiction the crime was committed, should demand the accused from the judge of his domicile, [ 313 ] although the latter may have previous cognisance of the cause. (*prevenga en la causa*), he ought to hand the accused over, unless he is liable to corporal punishment, or being so, if the proceeding should be by accusation, *Cur. Filip. ibid.*

4th, That the *alcaldes* of the court (*de corte*) being supreme criminal judges, are in no case obliged to hand over or give up the accused, *Cur. Filip. ibid.* n. 7.

5th, We say the same of the *alcaldes del crimen* in the chanceries and audiences in respect to the cases *de corte* enumerated in *Cur. Filip. ibid.*

The accusation being preferred before a competent judge, he ought to cite the accused to appear or answer within twenty days, giving him a copy or *traslado* of the accusation, L. 14. tit. 1. P. 7. [L. 14. tit. 1. P. 7.] and in this term admit him to allege exceptions,<sup>16</sup> L. 16. tit. 1. P. 7. [L. 16. tit. 1. P. 7.] From thenceforward neither the accuser nor accused can desist from the criminal prosecution.<sup>17</sup> L. 17. tit. 1. P. 7. [L. 17. tit. 1. P. 7.] The accusation may be abandoned with the permission of the judge within thirty days after being preferred; and this may be always granted, provided no fraud or deceit is discovered in the accusation, or except in the six cases expressed by L. 19. tit. 1. P. 7. [L. 19. tit. 1. P. 7.]

The accusation is at an end by the death of the accuser,<sup>18</sup> or the accused, except it be with respect to crimes, which may be prosecuted against persons deceased,<sup>19</sup> L. 23. tit. 1. P. 7. [L. 23. tit. 1. P. 7.] and in the cases expressed in L. 24. and 25. <sup>20</sup> tit. 1. P. 7. [L. 24. and 25. tit. 1. P. 7.]

Cap. 1. The proceeding in the inquiry or investigation of a crime may be also by the mere denunciation of the party which any one may prefer, without being obliged to prove it before a competent judge, unless the delator bind himself to do so, or the judge should

<sup>16</sup> Dilatory exceptions before contestation or answer. *Vide* the law quoted, and note 1. *Greg. Lop.*, thereon.

<sup>17</sup> In any stage of the trial before sentence, the accuser may compound with the accused in criminal cases where the punishment is corporal, except in that of adultery, (which at present may be said not to entail corporal punishment), L. 22. tit. 1. P. 7. But this does not prevent the judge from proceeding in virtue of his office, in the like trial, until imposing the corporal punishment which the offence shall deserve, L. 10. tit. 24. lib. 8. *Rec.* (L. 4. tit. 40. lib. 12. Nov. Rec.)—*Palacios*.

<sup>18</sup> Heirs, if accusers, are not obliged after his death, to prosecute, but they may do so. *Vide* L. 23. tit. 1. P. 7.

<sup>19</sup> Or rather their property.

<sup>20</sup> As to the pecuniary penalty, the trial may be carried on against the heirs of the accused, even after his death, if, in his life-time, he had contested or answered the demand.

know that he proceeds maliciously, L. 27. tit. 1. P. 7. [L. 27. tit. 1. P. 7.]

The fiscal cannot prefer this delation without having information of the crime *in scriptis*, L. 3. tit. 15. lib. 2. Rec.,<sup>21</sup> [L. 11. tit. 13. lib. 4. Nov. Rec.] except upon notorious facts; and, in this case, the delator must give security at the will of the judge to prosecute to conclusion [314] the delation, L. 40. tit. 1. P. 7.<sup>22</sup> [L. 40. tit. 1. P. 7.] Then the judge proceeds to make the inquest of the crime, which is called *pesquisa*, L. 27. tit. 1. P. 7. [L. 27. tit. 1. P. 7.]

§ 1. This inquest (*pesquisa*) may be executed by virtue of office, not only in the five cases which L. 28. tit. 1. P. 7. [L. 28. tit. 1. P. 7.] points out, but also with respect to any other crime committed in the jurisdiction of the judge, L. 1. 5. and 6. tit. 1. lib. 8. Rec.; [L. 6. and 7. tit. 34. and L. 1. tit. 4. and L. 2. tit. 34. lib. 12. Nov. Rec.] if the crime were perpetrated out of the ordinary jurisdiction, the inquest being made, the process is sent to H. M., L. 1. tit. 1. lib. 8. Rec. [L. 7. tit. 34. lib. 12. Nov. Rec.]

Crimes which are not subject to inquest are, 1st, Verbal or slanderous injuries of little weight (*palabras livianas*), although they be of the grave kind (*graves*), if the party does not complain of them, L. 4. tit. 10. lib. 8. Rec. [L. 3. tit. 25. lib. 12. Nov. Rec.]

2d, Gaming, after the expiration of two months, L. 10. tit. 7. lib. 8. Rec. [L. 9. tit. 23. lib. 12. Nov. Rec.]

3d, Bad, or fraudulent tithe-gatherers, (*dezmeros*), L. 5. tit. 5. lib. 1. Rec. [L. 4. tit. 6. lib. 1. Nov. Rec.]

§ 2. There are two sorts of inquest, one particular; and the other general; the general inquest is that by which a general inquisition is made of all crimes, without particularising either the crime or the delinquent. The particular is, that which is directed to a specific crime and delinquent, *Cur. Filip.* p. 3. § 10. n. 2. The first is prohibited, unless it be by royal order or provision,<sup>23</sup> L. 3. tit. 1. lib. 8. Rec. [L. 3. tit. 34. lib. 12. Nov. Rec.]; but if it be so made, no account ought to be given to the parties of what hath been done, unless the inquest be directed against particular acts of persons; in which case, the answer of the witnesses may be shown to them for their defence, L. 4. tit. 1. lib. 8. Rec. [L. 1. tit. 34. lib. 12. Nov. Rec.]; nor must the ordinary judges execute it in person, L. 11. tit. 1. lib. 8.

<sup>21</sup> This should be L. 3. tit. 13. lib. 2. Rec.; (L. 1. tit. 33. lib. 12. Nov. Rec.): as noticed by *Palacios*; which, he observes, does not set forth what is stated by the text. The law states, that the fiscal shall not accuse or prosecute, nor enter a civil suit in the name of the king, unless he furnish to the *oidors* or judges the name of the informer (*delator*), whose declaration or information shall be taken in writing before the public *escribano*. *Vide* this law.

<sup>22</sup> This quotation is erroneous. *Palacios* says, it should be L. 4. tit. 13. lib. 2. Rec.: (L. 2. tit. 33. lib. 12. Nov. Rec.)

<sup>23</sup> *Palacios* says, there are inquests which are general in respect to persons, and special in respect to crimes; that such inquests are not prohibited, but are very frequent; and that every judge may take or make them in virtue of his office; for that, otherwise, offences could not be established. The learned Professor cites *Cur. Filip.* p. 3. § 10.

Rec.<sup>24</sup> [L. 8. tit. 34. lib. 12. Nov. Rec.] But the particular inquest must be made on hearing the party, giving him a copy of the process, and proceeding summarily, L. 1. tit. 1. lib. 8. Rec. [L. 8. tit. 34. lib. 12. Nov. Rec.]

The judge of inquiry (*pesquisidor*) being a commissioned judge, it follows,

1st, That he ought to possess the qualities required by Ll. 8. and 9. tit. 17. P. 3. [Ll. 8. and 9. tit. 17. P. 3.]

2d, That no one can excuse himself, on pain of one hundred *maravedis*, unless on account of sickness, enmity, or suits, L. 6. tit. 17. P. 3. [L. 6. tit. 17. P. 3.]

3d, That not fulfilling his duty properly and faithfully, he may suffer the penalty *talionis*, L. 12. tit. 17. P. 3. [L. 12. tit. 17. P. 7.]

4th, That the judge of inquiry against a mayor (*corregidor*), cannot act as such in the place where the latter presides, until after the expiration of a year, L. 6. tit. 7. lib. 3. Rec. [L. 16. tit. 13. lib. 7. Nov. Rec.]

§ 3. The king, or the council in his name, may appoint a judge of inquiry (*juez pesquisidor*) at the instance of the party, or on his own authority, who must, 1st, Swear before receiving the appointment what is contained in the laws of the *Ordenamiento de Alcalá*, [ 315 ] and expressed in L. 7. tit. 1. lib. 8. Rec. [L. 11. tit. 34. lib. 12. Nov. Rec.]

2d, He ought to set out within three days, it being at the instance of the party, and not doing so, recourse may be had to the fiscal to compel him to do it, L. 10. tit. 1. lib. 8. Rec. [Nota 2. tit. 34. lib. 12. Nov. Rec.]

3d, The judge of inquiry must go at the cost of the party who prays the inquest, L. 5. tit. 5. lib. 3. Rec. [Ll. 5. tit. 11. lib. 7. and 6. tit. 34. lib. 12. Nov. Rec.], and if it were through the negligence of the ordinary judge, it must be at the cost of the latter,<sup>25</sup> Ll. 2. and 8. tit. 1. lib. 8. Rec. [Ll. 5. and 10. tit. 34. lib. 12. Nov. Rec.], he remaining suspended from office.<sup>26</sup> 4th, The proceedings of these commissioned judges must not depart from the rule of the ordinary judge of inquest, which is explained in *Cur. Filip.* § 10. P. 3.

5th, Not more than one proceeding must be made, although there be several delinquents, L. 12. tit. 1. lib. 8. Rec. [L. 9. tit. 34. lib. 12. Nov. Rec.]

6th, The commission being completed, a *traslado*, or copy of its

<sup>24</sup> *Palacios* observes, that the law cited enjoins the contrary; that is, that the judges must execute the duty in person. Vide L. 8. tit. 34. lib. 12. Nov. Rec.

<sup>25</sup> *Palacios* adds, if the judge shall not be culpable, at the cost of those who are guilty; and if these should not be found, at the cost of the corporation or town funds (*propios*); and if there should be no such funds, at the cost of those who are accustomed to pay in all things which are for the good of the town or place: he refers to L. 5. tit. 5. lib. 3., and L. 8. tit. 1. lib. 8. Rec.; (L. 3. tit. 11. lib. 7., and 6. and 10. tit. 34. lib. 12. Nov. Rec.)

<sup>26</sup> This would seem in regard to the particular case. Vide L. 5. tit. 34. lib. 12. Nov. Rec., *ad fin.*

sentences; must be given to the ordinary judges, or the judges of *residencia*, as to what respects those absent from their jurisdiction, L. 9. tit. 1. lib. 8. Rec. [L. 12. tit. 34. lib. 12. Nov. Rec.]

7th, No commissioned judge can pronounce sentence against a person of distinction (*grande*) without the advice (*consulta*) of the council, L. 33. tit. 6. lib. 2. Rec. [L. 19. tit. 1. lib. 6. Nov. Rec.]

8th, The judges commissioned by the council must give an account within twenty days of their commission, *Aut.* 2. tit. 1. lib. 8. Rec.,<sup>27</sup> and the escribanos who go to the inquest are bound to deliver the processes, within two months, to the escribano of the council which shall have despatched them, under a penalty of three thousand *maravedis*, and a year's suspension from office; a *traslado* or copy of which, if it should be prayed for by the parties, is extracted or made by the escribano of the cause without delay, L. 10. and 17. tit. 1. lib. 8. Rec. [L. 13. tit. 34. lib. 12. Nov. Rec.]

9th, The ordinary judges can only appoint (*comisionar*) the inquest in grave cases, L. 8. tit. 1. lib. 8. Rec. [L. 10. tit. 34. lib. 12. Nov. Rec.,] and even this within their jurisdiction, also as *alcaldes del crimen* of the audiences they cannot send judges of inquiry beyond the five leagues, L. 4. tit. 7. lib. 8. Rec.<sup>28</sup> [L. 3. tit. 23. lib. 12. Nov. Rec.]

Cap. 3. In order to provide that no criminal shall remain unpunished for his offence, the judge must take care that the delinquent be imprisoned or secured (*preso*) in the best way possible; to this end prisons are established in the towns of their jurisdiction, which belong (*son privativas*) to the king, his magistrates, and those to whom the sovereign gives permission to have them under pain of death,<sup>29</sup> L. 15. tit. 29. Part. 7. [L. 15. tit. 29. P. 7.]

[ 316 ] Thus, therefore, in order to imprison a delinquent, it is necessary to have in consideration the gravity of the offence, and the quality or rank of the offender. Wherefore, 1st, The imprisonment ought to be executed by the judge, or those commissioned by him, on a previous information of the crime, except when done or directed on the commission of the offence itself (*in flagranti delicto*).

2d, That with respect to certain persons, and for certain offences, the imprisonment is excused or moderated.

From the first principle it follows,

1st, That if on a summary information received, there results any presumption or proof of an offence, the judge proceeds immediately to the apprehension or arrest of the accused,<sup>30</sup> L. 1. tit. 29. P.

<sup>27</sup> Not inserted in the *Nov. Rec.*

<sup>28</sup> *Palacios* observes, that this should be L. 4. tit. 7. lib. 2. Rec.; (L. 7. tit. 14. lib. 5. Nov. Rec.)

<sup>29</sup> But private individuals may have stocks in their houses, &c., to confine slaves, &c., to restrain them from absconding. *Vide* L. 15. tit. 29. P. 7. *ad fin.*

<sup>30</sup> *Vide* Notes, *Greg. Lopez* on this law. The word *prision* is used in the text, which may mean actual imprisonment, or a mere arrest; in the last sense it is given in the translation; and in this sense it appears to be used in L. 1. tit. 29. P. 7. *Palacios*, from

7. [L. 1. tit. 29. P. 7. ;] and if the accused should be out of his jurisdiction, although it be in districts of peculiar dominiun (*señorio*), he ought to send to demand him from the judge in whose jurisdiction he may be, accompanying his demand with a warrant (*carta requisitoria*), setting forth (*que justifique*) the offence; and being a commissioned judge, his commission ought to be inserted in the warrant, *Cur. Filip.* P. 3. § 11. n. 7. and 8.; and even if there be a cause pending against him before the judge in whose jurisdiction he shall be found, and there is evidence of his escape, the latter may remand him without such warrant, L. 18. tit. 1. P. 7. [L. 18. tit. 1. P. 7.]

2d, That any one required by the judge of the cause, is bound to deliver up the accused, L. 2. tit. 16. lib. 8. Rec. [L. 5. tit. 18. lib. 12. Nov. Rec.]

3d, That justices, as well ecclesiastic as secular, and others, together with any inhabitant, are bound to afford assistance to apprehend the accused whenever the judge may demand it, *Cur. Filip.* P. 3. § 11. n. 9.

4th, That no one of his own authority may apprehend the delinquent after any time has elapsed from the execution of the crime, except in the cases mentioned in L. 2. tit. 29. P. 7. [L. 2. tit. 29. P. 7.], presenting him to the judge within twenty-four hours, *Greg. Lop. ibid.* gl. 1 and 5.

5th, That the alguazil cannot apprehend the delinquent without the order of the judge, except he be found *in flagranti delicto*; in which case he is obliged to present the offender to the judge, before lodging him in jail,<sup>31</sup> L. 7. tit. 23. lib. 4. Rec. [L. 4. tit. 33. lib. 5. Nov. Rec.]

6th, The inferior judge may also apprehend, *in flagranti delicto*, the delinquent over whom he has not jurisdiction, and transmit him to his judge, *Cur. Filip.* part. 3. § 11. num. 4 and 5.

On the second principle it is established, 1st, That the noble cannot be committed to the same prison as the plebeian, Ll. 4. and 6. tit. 29. P. 7.; L. 11. tit. 2. lib. 6. Rec. [L. 11. tit. 2. lib. 6. Nov. Rec. Ll. 4. 6. tit. 29. P. 7.]

2d, That women must have a separate prison from men; [ 317. ] and being of quality must not be imprisoned in a public prison, except for a grave or serious crime: so that whenever they can be

an observation on this part of the text, would seem to view it in the first sense. He says, every presumption does not appear to me sufficient to proceed to so important an act as that "*de una prision*;" nor does every crime appear to me sufficient to authorise it, although there be proof. He, however, quotes a criminal law writer, who uses the word *arrestar*; and he refers to the *Instruction to Corregidores* of 15th May, 1778; and the *Pragmat. Sanc.* of 27th May, 1786. *Vide* L. 25. tit. 38.; and L. 10. tit. 32. lib. 12.; and L. 19. tit. 31. lib. 11. Nov. Rec.

<sup>31</sup> *Palacios*, referring to the law cited in the text, says, if the *alguazil* should apprehend the delinquent in the night, he may lodge him in the jail; giving immediate information in the morning to the judge, in order that he may issue the necessary order. He adds, that any one who hears another blaspheming, may arrest and carry him to jail, L. 4. tit. 4. lib. 5. Rec. (L. 3. tit. 5. lib. 12. Nov. Rec.)

secured on bail, or in any secluded place of a monastery, it must be done, L. 5. tit. 29. P. 7.; L. 2. tit. 24. lib. 4. Rec. [L. 5. tit. 29. P. 7. L. 3. tit. 38. lib. 12. Nov. Rec.]

3d, If the offence does not merit corporal punishment, the judge is bound to admit the prisoner to bail; and if his innocence appear, to discharge him, L. 16. tit. 1. P. 7. and L. 8. tit. 7. lib. 2. Rec;<sup>32</sup> [L. 16. tit. 1. P. 7., L. 6. tit. 12. lib. 5. Nov. Rec;] it being observed, that although one of the *alcaldes* of the court (*de corte*), may take the information, and order the apprehension or imprisonment of the offender, he cannot, by himself, discharge him without the approbation of the whole hall (*sala*), L. 6. tit. 6. lib. 2. Rec. [L. 8. tit. 27. lib. 4. Nov. Rec.]

The offender who escapes from prison, besides being taken, or considered as having confessed, must be punished for the breach or escape at the discretion of the judge, L. 13. tit. 29. P. 7.; L. 7. tit. *fin.* lib. 8. Rec.; [L. 13. tit. 29. P. 7. L. 17. tit. 38. lib. 12 Nov. Rec.] and he who violently rescues (*suca por fuerza*) the prisoner from jail, incurs the penalty of the offence; and if the prisoner was confined for debt, that of being obliged to pay it, and of being punished at the discretion of the judge for the breach: but this last is moderated with respect to the son who rescues his father, and with respect to the husband who rescues his wife, or *vice versa*<sup>33</sup>, L. 14. tit. 29. P. 7. [L. 14. tit. 29. P. 7.]

Cap. 6. The offender being imprisoned, the judge himself, in the presence of the *escribano*, ought to receive the confession of the accused on oath, Ll. 1 and 6. tit. 29. P. 7.,<sup>34</sup> and this with entire secrecy, L. 3. tit. 30. P. 7.<sup>35</sup> This confession, in order to be just and legal, must be received by the judge who has jurisdiction of the cause (*competente de la causa*), there being one eye-witness of the fact (*testigo de vista*), or having certain knowledge thereof, (*cierta ciencia*) against the accused, free from all exception; or presumptions, (*indicios*), which produce half proof, he being notified of the same, having the deposition read to him, and being informed thereof, *Cur. Filip.* P. 3. § 13. n. 4. &c; where may be seen various opinions with regard to criminal confession.

Cap. 6. If, after the publication of the proofs of the witnesses, it is prayed by the accuser that the accused may be tortured, on account

<sup>32</sup> Vide also on this point, 2d Vil. Mat. Crim. ob. 9. § 4. p. 128. n. 127.; 1st vol. Gut. Prac. Crim., c. 6. p. 209. No. 2.; and Greg. Lop. Gl. 4 and 5 on L. 16. tit. 1. P. 7.; also Greg. Lop. Gl. 4. L. 10. tit. 29. P. 7.; the summary of this last title; *Curis Filip.* tit. *Prision*, p. 209. n. 14.; L. 6. tit. 12. lib. 5. Nov. Rec.; and L. 25. tit. 38. lib. 12. Nov. Rec. It is inferred from some of the foregoing authorities that mere imprisonment is not considered a corporal punishment which renders an offence not bailable under the Spanish law.

<sup>33</sup> *Palacios* says, these exceptions are not to be found in L. 14. tit. 29. P. 7., cited, but in *Curis Filip.* p. 3. § 11. n. 12.

<sup>34</sup> These laws do not apply.

<sup>35</sup> This law applies to cases of torture. *Cur. Phil.* p. 3. § 13. n. 1. quotes Ll. 4. and 6. tit. 29 P. 7., in support of the precise dictum; the first of which laws has reference to the point.

of not having sufficient proof, if there be sufficient proof to authorise its infliction on the accused, and he is a person to whom torture may be applied, this last means of proof (or rather mode of procuring proof) is resorted to, in order that he may not remain unpunished.

Torture is a species of proof, which those who were lovers of justice<sup>36</sup> found out in order to investigate and know by it the truth of those evil acts which are done secretly and cannot be known or proved in any other manner, L. 1. tit. 30. P. 7.<sup>37</sup> [L. 1. tit. 30. P. 7.]

Formerly in our Spain both the accused and the accuser [ 318 ] were tortured<sup>38</sup> in order that the cause might be proceeded in with greater certainty, L. 2. tit. 1. lib. 6. *Fuero Juzgo*. The mode by which the accused purged themselves of a crime was remarkable, exposing themselves to chance, by which they overcame the torture of boiling water, red-hot iron, and others, on which the definitive sentence of the judge depended, L. 3. *ibid*.

With respect to torture, we establish three principles, 1st, That it is not applied to all kinds of persons.

2d, That it is made use of only to complete the discovery of truth.

3d, That it must be preceded by the most urgent or violent presumptions (*indicios*), in grave crimes.

From the first principle it follows, 1st, That persons under fourteen years of age, a knight (*caballero*), one of the degree of doctor, a counsellor, a mayor of a corporation (*regidor de concejo*), nor their children, nor those of good character, cannot be tortured, nor the woman who is pregnant, until she brings forth, L. 2. tit. 30. P. 7. [L. 2. tit. 30. P. 7.]

2d, Neither can all those in the right ascending or descending line to the fourth degree be tortured to give evidence against each other, nor collaterals to the same degree against their relations, L. 9. tit. 30. P. 7. [L. 9. tit. 30. P. 7.]

3d, Nor the wife against her husband, nor the father or mother-in-law against their sons or daughters-in-law, nor step-fathers against the children of a former marriage, and *vice versa*, L. 9. tit. 30. P. 7. [L. 9. tit. 30. P. 7.]

From the second principle it arises, 1st, That in torture the judge,

<sup>36</sup> What a libel on the term Justice!

<sup>37</sup> The insertion of this chapter in the translation may seem unnecessary in regard to any desired information connected with Trinidad; but as it forms part of the work, it has been thought fit to give it due place here. The infliction of torture, in the case of Louisa Calderon, reported in *Howell's State Trials*, vol. xxx. p. 225. produced it is believed, instructions from the British government to the governors of that island, to prevent recourse to any punishment not permitted by the laws of England; and British professional judges have, for some years past, presided in the courts of the island.

Humanity has deeply to mourn the discovery and adoption of this probatory species of detestable ingenuity.

By late Orders in Council, of 16th September, 1822, given in Append. F and Q, beneficial alterations have been made in the judicial establishments of the colony, and in the course of juridical procedure.

<sup>38</sup> This would seem to have established impunity for crime, for doubtless there could have been none or very few accusers found. *Palacios* says, the accused only was tortured, as stated by the law quoted.



escribano, and executioner must be present, the judge putting questions generally, as directed by L. 3. tit. 30. P. 7. [L. 3. tit. 30. P. 7.]

2d, That there being two or more persons to be tortured, they begin with the weakest, or if not with the one against whom there is the most vehement presumption, L. 5. tit. 30. P. 7. [L. 5. tit. 30. P. 7.]

3d, That the judge protests that if the person does not speak the truth, and dies from the torture, the charge is not with him; but if he inflicts the torture unjustly, he ought to suffer the same punishment as he orders to be inflicted, comparison being had (*graduandose*) to the persons of the judge and him tortured, L. 4. tit. 30. P. 7. [L. 4. tit. 30. P. 7.]

4th, That a confession received under torture, is not valid, unless it be afterwards ratified in another place, L. 4. tit. 30. P. 7. [L. 4. tit. 30. P. 7.]

5th, That if on this last confession he shall deny, he may not be again tortured, except it be the crime of high treason, theft, or robbery; but in these cases, the accused being tortured three times, if [ 319 ] afterwards he shall deny the charge, the torture shall not be repeated, L. 4. tit. 30. P. 7. [L. 4. tit. 30. P. 7.]

6th, That the (ordinary) tortures must be made use of, and not new extraordinary kinds, L. 1. tit. 30. P. 7. [L. 1. tit. 30. P. 7.]

7th, That the witness who is perceived varying in his answers, may be tortured in the same manner as the accused, L. 8. tit. 30. P. 7. [L. 8. tit. 30. P. 7.]

8th, That there being full proof of the crime, the accused cannot be tortured under pain of the judge paying the damages and interests (*intereses*), *Cur. Filip.* P. 3 § 16. n. 2.

From the third principle, it is inferred, 1st, That the accused cannot be tortured without previous sufficient presumptions, L. 2. tit. 30. P. 7. [L. 2. tit. 30. P. 7.,] which depend on the prudence and discretion of the judge.

2d, That if the accused shall deny the charge under torture, he may be tortured again, there supervening most urgent or vehement presumptions, *Cur. Filip.* P. 3. § 16. n. 16.

3d, That the torture is only applied from presumptions of crime which deserves corporal punishment, and not pecuniary, L. 26. tit. 1. P. 7.<sup>39</sup>

Cap. 7. When once the innocence or guilt of the delinquent is established, they proceed to sentence, from which not only the accused may appeal,<sup>40</sup> but any one in his name,<sup>41</sup> so that within the term of appeal he be authorised to do so, or his act be ratified; for which circumstance it is not necessary that the appellant be related to the delinquent, L. 6. tit. 23. P. 3. [L. 6. tit. 23. P. 3.] In the mean

<sup>39</sup> This law does not apply. See *Cur. Filip.*, p. 3. § 16. n. 3.

<sup>40</sup> See Order in Council, 16th Sept. 1822. Appendix F.

<sup>41</sup> Any one, says *Palacios*, referring to L. 6. tit. 23. P. 3., may appeal; but this is understood in respect to a capital case.

time he must not be released from prison, but he must be handed over secured to the judge of appeal, L. 16. tit. 18. lib. 4. Rec. [L. 19. tit. 20. lib. 11. Nov. Rec.]

But no appeal is admitted from noted (*famosos*) crimes which are fully proved, nor from an unnatural crime (*pecado nefundo*;<sup>42</sup>) L. 16. tit. 13. P. 3. and L. 1. tit. 21. lib. 8. Rec. [L. 16. tit. 23. P. 3. L. 1. tit. 30. lib. 12. Nov. Recop.]

If the sentence is that of death, it is executed (being preceded by the administration of the sacrament to the delinquent, L. 9. tit. 1. lib. 1. Rec. [L. 11. tit. 1. lib. 1. Nov. Rec.,]) publicly for a warning to all others, L. 11. tit. 31. P. 7. [L. 11. tit. 31. P. 7.]

If the delinquent, through contumacy or absence, cannot be had or taken, and the crime were of the class which requires the sequestration of property, the sequestration ought to be made without proclamation (*pregon*), and the delinquent cited for three periods of nine days, whether he be or not in the jurisdiction;<sup>43</sup> and if at the first period (*plazo*) he should not appear, he shall pay the contempt (*despres*);<sup>44</sup> appearing at the second period, he shall pay the contempt and costs, and may be heard: but if at the second he does not appear, and he be accused of a second contumacy (*rebeldia*), in the crime of death or murder, he shall be condemned in the fine for killing (*homicillo*);<sup>45</sup> if at the third period he should come, he shall pay [ 320 ] the contempt, the fine of killing, and the costs, and may be heard: but if this last term be passed, and he does not appear, the accusation shall be laid against him in form, as though he were present, he being ordered to answer within three days: and not coming, and being accused of this contumacy, the pleadings (*pleyto*) are had as concluded. The cause is received for proof in the regular terms of a civil suit, until conclusion for definitive sentence, he being declared guilty of the crime, and being condemned to the punishment which he may merit, there being proof sufficient to put him to the torture. The accused having appeared to offer himself at the prison, or being arrested before the definitive sentence, if he pays the penalties of contumacy, he ought to be heard anew, all the process remaining in force; and even if he present himself within the year after the definitive sentence, he may be heard with regard to the pecuniary penalties,<sup>46</sup> which cannot be executed or levied within it. If within this year the accused should die, his heirs shall be heard with respect to the pecuniary penalties in the cases in which the crime is not extinguished or expiated by death, wherefore L. 7. tit. 8. P. 3. is

<sup>42</sup> For information in respect to appeals, &c., in criminal cases, *Palacios* refers to *Gutierrez, Prac. Crim.* tom. 1. cap. 10. § § 1, 2, and 3.

<sup>43</sup> On this subject, *Palacios* refers to L. 7. tit. 6. lib. 2.; and 3. tit. 10. lib. 4. Rec. (Ll. 2 and 1. tit. 37. lib. 12, Nov. Rec.)

<sup>44</sup> Which, says *Palacios*, referring to *Azevedo* on L. 3. tit. 10. lib. 4. Rec., means as much as sixty *maravedises*.

<sup>45</sup> 600 *maravedises*, says *Palacios*.

<sup>46</sup> And in respect also to the corporal punishment, adds *Palacios*.

altered. The sequestration being made against the property of the absent delinquent, if within thirty days he does not appear, the judge shall be obliged to sell it at public auction, if perishable (*deteriorable*), and place the amount in sequestration, L. 3. tit. 10. lib. 4. Rec. [L. 1. tit. 37. lib. 12. Nov. Rec.]

In order to declare the accused contumacious, after the sentence and conclusion, it is necessary that there be lawful proof; that three months be expired, and that the plaintiff accuse him of contumacy, L. 1. tit. 10. lib. 4. Rec. [L. 4. tit. 37. lib. 12. Nov. Rec.]

## BOOK IV.

### TITLE I.

#### OF THE MODE OF ACQUIRING DOMINION, FROM ALVAREZ'S INSTITUTES.

*Translation from the Instituciones de Derecho Real de España, por el Doctor Don Jose Maria Alvarez, Catedratico de Instituciones de Justiniano en la Real y Pontificia Universidad de Goatemala. Madrid, 1829. vol. 1. p. 142.*

#### OF THE MODE OF ACQUIRING DOMINION.

As DOMINION is the first species of right in the thing, before considering it, and the mode of acquiring it, it is necessary to explain: 1, what is *right in the thing, and to the thing*, and how many species there are of each: 2, what is dominion, and how it is divided: 3, what is meant by mode of acquiring dominion: 4, what are the modes of acquiring it, and how they are divided.

##### § 1. *What is Right in and to the Thing.*

The former is a power (*facultad*) that belongs to a man in a certain and determinate thing without reference to any person. Arg. of Law 13. tit. 11. Part. 3. The latter, on the contrary, is the power that a person has against another to oblige him to give, or make for him any thing. Arg. of L. 33. tit. 5. Part. 5.

The difference between the two rights are clear: 1. When I have a right *in the thing*, it is the thing that is bound to me; and when I have a right *to the thing*, the person.

2. By the right *in the thing* I ask for that which is already mine, and by the right *to the thing* I ask that there be given or made for me the thing that another person is obliged to give to or make for me.

3. From the right *in the thing* arise real actions against any possessor; and from the right *to the thing* only personal actions against the determinate person with whom I contracted. By putting the cases of a thing in which one has dominion, being lost or stolen, and another thing bought and not delivered, the distinction between the two rights will be plainly perceived.

Of right *to the thing* there is but one species, and that is *obligation*; but of right *in the thing* there are various. Four are generally enumerated: *dominion*, *inheritance*, *servitude*, and *pledge*.

§ 2. *What is Dominion and its Divisions.*

We have said that the first species of right in the thing was called dominion: that is *the right in a corporal thing, from which arises the power of disposing of it and of claiming it, if not prevented by law, agreement, or the will of the testator.* Law 1. tit. 28. Part. 3.

It is called *right in the thing*, because the thing is bound to the lord in such a way, that he can remove (*estraer*) it from any possession. It must be in a thing strictly *corporal*, because incorporeal things are not in *dominion* but in *property* (*bienes*). It is said moreover, *from which arises the power of disposing of the thing and of claiming it*, because he who is the lord has in the first place the power of disposing of his things, using them to the exclusion of every other person; he may give, sell, and transfer it to any other person at his pleasure; and he has in the second place the power of claiming it, that is, of withdrawing it from any possessor. But nevertheless, to meet various cases, there is added in the definition, *if not prevented by law, agreement, or the will of the testator.* *Law*, for example: this prevents us from claiming the things that have now been prescribed to us (that is, where the remedy is lost by lapse of time). *Agreement*: This prohibits the feudatory from alienating the land, although he be owner of it. *Will of the testator*: And, this, finally, prohibits the alienation of a thing left by the testator with the condition of never alienating it.

Dominion is divided into *full* and *less full*. The former is when the power of disposing of the thing and that of using it are united in one person. The latter is when those two rights are separated, so that one person has the one and a different person the other; for example: in the feud the vassal has the right of receiving the profits of the thing, but not of disposing of it at his pleasure, but it is divided between the lord and the vassal, so that the latter cannot alienate the land, nor hypothecate it without the consent of the lord; consequently neither of the two has full dominion, but less than full.

This less than full dominion is divided into direct and useful: he who has the power of disposing of the thing will have the direct dominion, and he who only enjoys its profits, the useful dominion. The emphyteusis (lease) will serve us for an example: the lord of the emphyteusis has the direct dominion, and the emphyteuta (lessee) the useful dominion. Law 1. tit. 28. Part. 3. Let us now see,

§ 3. *What is meant by Mode of acquiring Dominion.*

The distinction is worthy of remark that is found between the *title* and the *mode of acquiring dominion*, and it must be borne in mind in regard to every thing that will be hereafter treated of. All dominion has two causes, *proximate* and *remote*. Proximate is that

by which, without the mediation of any other thing, the dominion is obtained; and remote is that which must precede, and by means of which it is acquired; for example, if I buy a jewel from Titius, and he delivers it to me, I acquire dominion. In this case the delivery is the proximate cause, and the contract of purchase is the remote. The proximate cause is called, *mode of acquiring*, and the remote, *title*.

The effects of these two things are also different. 1. By the title a right is only acquired *to the thing*, and by the mode of acquiring *in the thing*. 2. The title gives only a *personal* action against the person with whom we contract, and the mode of acquiring gives a *real* action against any possessor. It serves, then, for a general rule that the *title never gives a right in the thing, unless delivery be joined with it*. Consequently, although I may have purchased something, or it may have been given or bequeathed to me, I am not lord of it before the delivery be made to me, which is what alone transfers the dominion, or the right in the thing, whenever it is preceded by a title suitable to transfer the dominion; consequently neither is title sufficient without delivery, nor delivery without title.

Notwithstanding this, there are found some cases in which right in the thing is given without delivery, on account of delivery not being possible.

1. In hypothecation.
2. In the negative servitudes.
3. The thing adjudicated by the three divisory courts.
4. Acquisitions by testament.

The reasons given by the author for these exceptions, are omitted in this translation.

#### § 4. *What are the Modes of acquiring Dominion, and how they are divided.*

Of the modes of acquiring dominion, some have their origin from the law of nature and nations, and those are common to all nations: others are derived from the civil law, and differ according to the laws of the countries. Delivery, for example, is a mode of acquiring common to all nations: on the contrary, prescription is either not known, or has different rules in other kingdoms than Spain; from which it is inferred that delivery is a mode of acquiring by the law of nations, and prescription by the civil law.

Of the natural modes of acquiring some are called *originary* and others *derivative*. If we acquire a thing that is not in the dominion of another, as a wild animal, a fish, &c., it will be an originary mode of acquiring; but if a thing that is in the dominion of another be transferred to us and delivered by its owner, it will be derivative; for example, the purchaser who acquires the dominion of the thing purchased. Of the same originary modes there is also a convenient subdivision, because I acquire either the substance itself of the thing, or its increase and produce: in the former case it will be a mode of

acquiring perfectly originary, and in the latter it will be less perfect; for example: if one catch a swarm of bees in a wood, and shut them up in his hive, this mode of acquiring will be perfectly originary, because what he has acquired is the substance itself of the bees, making himself also afterwards owner of the honey that they make: and here we have another originary mode of acquiring, although not so perfect as the first, because it is by it that he has made himself owner of the increase and produce of the thing.

By what has been said are clearly inferred the natural modes that there are of acquiring. One is perfect originary, and this is called *occupation*; there is another less perfect originary, and that is called *accession*; and another derivative, which is called *delivery*.

§ 5. Of occupation, the first method of acquiring dominion.

§ 6. Of accession, the second mode of acquiring dominion.

The author's remarks on these subjects are omitted in this translation.

### § 7. Of Delivery, the only derivative Mode of acquiring.

We have now seen the originary modes of acquiring: the derivative follows, which is only one, and is called *delivery*. We said that the derivative mode of acquiring is when the dominion is transferred from one to another; and so we will define delivery by saying: that it is *a derivative mode of acquiring by which the lord of the thing who has the right and mind or intention of alienating it, transfers with just cause a corporal thing to him who receives it.* Law 46. tit. 28. Part. 3. Hence arises four axioms: 1. *That only corporal things can be delivered*, for they only can be transferred by a corporal act from one to another: for this reason corporal things, as rights, are not delivered, but are only *quasi* delivered; and *quasi* delivery consists in the suffering of the one and the exercise of the other. From the same definition it follows that delivery is either *natural* or *symbolical*, *brevis manus*, or *longa manu*. Delivery is made naturally when by a corporal act the thing is transferred to the person who receives it. It is called *symbolical* when one thing is delivered in token of another, whose dominion it is wished to transfer, as for example, if the keys are given of the granary which encloses the wheat that is sold. The delivery is said to be made *longa manu* when the thing is put in the presence of him to whom it is delivered; but he touches it only with his eyes. Law 6. tit. 30. Part. 3. words "Nevertheless if a man." An equivalent to actual delivery is called *brevis manus*, and takes place when one who is already in possession of the thing, acknowledges the delivery of it to him, in virtue of the owner, in pursuance of some contract, ceding it to him in full property; for example, I lend to Titius a book; afterwards I sell it to him and say to him that, supposing it to be in his possession, it may remain with him: in this case it is the same as if it were delivered to him.

Axiom 2. *The thing must be delivered by the lord.* The reason is, because that which one does not hold he cannot give to another;

and thus, if I have received a thing with good faith from one who is not lord, I shall make myself possessor with good faith, but not lord. Neither can a ward transfer dominion, because, although he is lord, he is not considered as a perfect person for defect of judgment, and so can do nothing which might make his condition worse without the authority of the guardian, and consequently cannot transfer dominion.

**Axiom 3.** *Dominion is not transferred if there be not an intention to alienate.* The reason is, because to the lord only it is competent to give the law to his things and to dispose of them, and if he directs that only the use or custody of his thing shall pass, he who receives it by that delivery will not become lord; for example, if I deposit or let to hire or lend my thing, delivery takes place; but the depositary, hirer or borrower do not become owners of it, because in me is wanting the intention or will of alienating it.

**Axiom 4.** *Dominion is not acquired by delivery unless preceded by a title suitable to transfer it,* as those that we have before explained, to wit, gift, sale, legacy. The contract of purchase and sale is peculiar in this respect, that although it may be perfected by the delivery of the thing, yet the dominion is not transferred until the price be delivered; but if security or pledge be given, or the seller gives credit to the buyer, the dominion of the thing sold will pass. Law 46. tit. 28. Part. 3.

In regard to the necessity of delivery of the thing in order to acquire the dominion, it is worthy of remark that that is certainly the case in the civil law; but it is very probable that this subtlety is not regarded by the law of nature; and so, according to the letter, any true owner with absolute right who has the intention or will of alienating, and declares it expressly or by signs intended for the purpose, transfers the dominion validly, although delivery of the thing do not intervene. Hein. Elem. Jur. Nat. lib. 1. cap. 10. s. 275.



## TITLE II.

### PRESCRIPTION, FROM FEBRERO NOVISIMO.

#### *Translation from the "Febrero Novisimo" by Tapia.*

19. Of the modes of acquiring it (dominion) by the civil or municipal law (*derecho civil*) the first is prescription, or the right which arises from the uninterrupted possession of a thing during the time fixed by the laws; or more properly, it is a peremptory exception, by which the possessor in good faith may repel after the time prescribed by law him who claims the dominion of the thing that he alleges to be his, and of which he has for a long time been dispossessed. Prescrip-



tion was introduced in the first place for the public benefit, in order that the dominion of things might not be for a long time, or almost forever uncertain; secondly, in order to avoid the innumerable and perpetual litigations which might otherwise arise; thirdly, in order that possessors might not always be under the apprehension of being deprived of what they were enjoying in good faith; and fourthly, in order to punish the indolence of those who are dilatory in recovering their property by which they must impute to themselves the loss of it. But it is to be observed, that where alienation is prohibited, prescription or toleration is also prohibited, being a tacit alienation and comprehended under the general name of alienation.

14. In order that this mode of acquiring the dominion may take place, the following circumstances are necessary, 1st, Title of acquisition; that is to say, that the thing be held by purchase, gift, inheritance or other of the contracts that transfer dominion. 2d. Good faith. 3d. Continued possession. 4th, The time prescribed by law. 5th, Capacity of the person who prescribes, and of the thing prescribed; that is to say, that there be nothing to hinder the possessor from prescribing, nor the thing from being the object of prescription.

15. The title must be real (*verdadero*), and therefore he who holds a thing believing it to be his own from being persuaded that it was given to him, cannot obtain prescription thereof, unless that belief proceeds from the act of another (*hecho ageno*) which is not imputable to him; for example if he had given an order to his agent or attorney to purchase it and the latter should deliver it to him, he supposing it to have been purchased, in that case prescription takes place.

16. Good faith consists in the possessor of the things believing that he is the owner thereof by having lawfully acquired it. Therefore he will not have good faith who purchases a thing, being notified by the owner that it is not the property of the seller, nor he who purchases any thing belonging to an orphan, an insane person, or from the attorney of another fraudulently or collusively. By the Roman laws, it was sufficient if the possessor had good faith at the time of acquiring the thing, except in the case of a purchase, in which it was also necessary at the time of contracting, a doctrine which was adopted in the law of *Partida*; but our most celebrated juriconsults are of opinion that in this particular the canon law must be followed in Spain; by which it is established that the good faith must continue until the completion of the prescription, relying also upon a law of the kingdom the spirit of which they find in conformity with the said doctrine.

17. Possession is called the lawful holding by a man, of things corporeal with the assistance of the body and of the mind; that is to say, the legal power that the man holds in the things that he has corporally or by will. It is of two kinds, one natural and the other civil or by permission of law. Natural is when the thing is held corporally, as a house, a watch, &c. Civil is when the thing is not held corporally but by will; for example, if one goes out of his house or

inheritance with the intention of not relinquishing it. Incorporeal things are possessed by the use thereof and the sufferance of their owners; of this class are rights, servitudes, &c.

18. The possession, as has been said, must be continued; that is to say, it must not be interrupted, either naturally, by him who had it losing it, or civilly, which is when any one commences a suit or makes a judicial demand against the possessor in respect of the said thing. By either of these two methods the prescription is cut off, and must begin anew. But neither by the death of the possessor nor by the alienation of the thing is the possession interrupted in the new owner if in him subsists good faith.

19. Every man of sound mind is capable of acquiring possession, not only by himself personally, but also by means of another empowered by him, if in him be united the two necessary requisites, which are the will or intention of acquiring it and the corporal act of occupation, or at least the presumed act, in the manner that was mentioned, when treating of symbolical delivery; that is by means of a sign that proves the possession. By occupation, possession cannot be gained for themselves by hirers, borrowers, depositaries and the like, who hold the thing in the name of another person, nor by those who enter by force upon the thing or steal it, because their holding is unlawful.

20. Possession is lost in two ways, 1st, Whenever the thing is reduced to such a state that it cannot be held either corporally or by will. 2d. In real property it is lost if the possessor be evicted by force, or if when he is not present another usurps it and prevents his entry, or if seeing that another is taking possession of his property, he consents to it by not impeding such usurpation. But although in these cases, the possession is lost, the dominion is not, and therefore, the party dispossessed may bring an action against him who has his property, for which purpose the summary courts of momentaneous possession are in use, which are so called on account of the brevity with which decisions are made in them; and they were introduced in order to avoid the disputes that arose respecting the right of possession. Those courts, called *interdictos*, will be explained in their proper place.

21. The time that is necessary to possess a thing to prescribe it, is three years if it were movable, and ten if it were immovable, or real, and the owner against whom the prescription runs is in the same province; but if he be out of it, twenty are necessary. There is also prescription by immemorial possession, which is proved by witnesses of good fame who depose to having seen the party in possession of the thing for the space of forty years, and that they heard it from their ancestors, without ever having seen or heard any thing to the contrary. By this possession the lordship of cities, towns and places, and jurisdiction, are acquired, but not the supreme jurisdiction which belongs to the king, nor tributes.

22. The time mentioned is sufficient for the prescription of the

thing, and thereby the dominion of it is acquired; but in order to gain the possession a year and a day is sufficient; so that if to this time be added title and good faith publicly and without opposition from the demandant, the possessor is not obliged to answer in respect to the possession.

23. Although in the language generally adopted it is said that actions or the right that any one has to sue us are prescribed, it is proper to remark that the effect of this prescription is entirely opposed to the idea that appears to be expressed, because far from acquiring any species of dominion by such a prescription, the action becomes extinguished and without any force; an exception resulting to him who prescribes.

24. All actions are not prescribed by a like space of time. Thus the right of executing by a personal obligation is prescribed by ten years, the personal action and the execution (*sentencia ejecutoriada*) granted thereon by twenty years. If a mortgage accompany the obligation, or the latter be mixed of personal and real thirty years are necessary in order to prescribe the debt. This is the express enactment (*la disposicion, terminante*) of Law. 5. tit. 8. book 11 of the Novisima Recopilacion, which law nor no other of that code speaks of prescription of the action merely real, and therefore we must refer to Law 21. tit. 29. of the third *Partida*, in which the term thirty years was fixed for the prescription of the real action.

25. The following actions are prescribed in three years, 1st, That which one who has served another has to recover his wages or salary. 2d, That which belongs to apothecaries, confectioners, jewellers and the like for the amount of their wares and work. 3d, That which advocates, attorneys and agents have for their salaries. The method of computing these three years is, in the case of servants, from the day on which they were dismissed, and in the other cases, from that on which the services or effects were received, observing that in order to prevent this prescription any demand of the debt is sufficient, although it be extrajudicial.

26. The things that cannot be prescribed on account of a legal incapacity of being so, are, in the first place, those which are called *de jure divino*; that is, things sacred, religious, or holy and a free man. Public squares, streets, commons, pasture grounds and other places belonging to towns or villages that are intended for the common use of their inhabitants. Things obtained by robbery or theft; those of minors under twenty-five years of age; those of sons under the power of their father, and those brought by the wife in dowry to her husband, unless the wife, knowing that the husband was dissipating his estate, omitted to sue for restitution of her dowry.

27. Prescription does not run against sons, whilst they are under paternal dominion, except in the cases in which they can appear in court without the license of their father, and compel him to give it. Nor against a married woman to recover her dowry, except that knowing that her husband is dissipating it, she is dilatory in exercising

her right; but it does for her paraphernalia, because in order to sue for them she may cause the judge to compel her husband to give her license. Nor against minors under twenty-five years of age, while they are such, unless they are successors of some ancestor against whom it had commenced running, although they may be restored if they pray restitution within the four years after the day on which the minority ended. The same doctrine holds with respect to the king or councils and communities, if they claim within the four years following the completion of the term of prescription, and with regard to a person employed in the service of the king or council or in schools, a captive or the like, inasmuch as he is to be restored from the time of this prescription, if he prays restitution within the four years after his employment ceased, and his heir within the four years following the day on which he knew of his decease.



## TITLE III.

## PRESCRIPTION, FROM AZEVEDO.

*Azevedo, Book 4. Tit. 15.—4. Ordinary Prescription of ten years amongst persons present, and twenty amongst absent suffices, against such as are inferior to the king, (P. 3. tit. 29. lib. 6. tit. 4. lib. 18.)*

47. ROYAL privileges which belong to the king as an acknowledgment of supreme power and recognition of subjection in his subjects, cannot be alienated, and by 48 is limited, unless the kingdom would suffer little from such loss.

For these royal privileges which belong to the king in sign of his supreme power and recognition of subjection cannot be alienated (from chap. *Intellecto de jure jurandi*) of which last, quoting several to the same purpose, Menchaca speaks (*de success. crea.* § 26. n. 9.) and better in No. 82, unless, as he himself says in the same place No. 83, the kingdom would be slightly injured by it, because in that case it would be well alienated, not otherwise, as is commonly asserted, Covarrubias saying, (chap. *quavis pactum* 2. P. § 2. n. 4.) where Mat. afflict. alleges, treating better upon these matters—"nay, and if the king should alienate any thing of his own, these royal attributes are always deemed excepted, and do not come into the alienation, according to Covarrubias (as above) amplifying this subject in another way (*in dect. n. 8.*) and, as we said above in this same law, also Pelaez (*de mayorilibus* 4. par. quest. 1. n. 55, with others following p. 406,) and again, there in 3 and 6. limit., since then they cannot be alienated, nor can they be prescribed, because

things which are inalienable, are also imprescriptible, according to text in *l. fi. fundum, ff. de fund. dotul.* But Nove declares in our words (*de priv. dot. 6. aut. 7. par. privilegio 8 limitacione 1.*) But what are said to be the royalties of the king, as sovereign, and what to the Pope is explained by Bal. quoted by Jas. (*in dict. l. imperium c. de prece. imp. offer.*) the same Jas. (*in dict. l. imperium, n. 10.*) and Auton. Gom. better still in *l. 40. de Toro n. 10.* and Montal, in *l. 5. tit. 11. lib. 1. of the Fuero*, and best of all, *Cassaneus* (in catalogue of the glories of the world, *5. part. 24, consid. optima l. 5. tit. 15. part.*) where Glossary 1, asks, whether mines are among the royal privileges—but as I shall say below, these are not of those imprescriptible privileges which are acquired by immemorial prescription, as the salt monopoly and other dues, which, although they be of the royalties, are still of the royal patrimony, therefore, can be prescribed, as will be said below, in speaking of the 3d and 5th (a law term,) of this kind of goods, and whether subjects of any prince can prescribe freedom and immunity from moneys to be paid, not indeed from those called tributes and census, because immunity from these is imprescriptible, but from taxes and new imposts which are not paid in acknowledgment of the supreme power, but for expenses of an impending war, or for relieving other necessities of the prince. So says Covarrubias, (*dict. cap. possess. 2 part. § 2. n. 8. versic. second species.*) and speaks of these same royal rights, as is also said by *Olanus* (*in concordate lettera, P. n. 119.*) but if these effects be of other parts of royalty, which are preserved and belong to the prince by reason of his rank, so that no one except the prince can execute them as the instituting notaries, laying on of taxes—making legitimate, illegitimate persons, and other like matters of which mention is made (*in cap. sup. gub. de verb. signif.*) these prescribe through time immemorial.

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#### TITLE IV.

(Translated from *Alvarez's Institutes*, vol. 1. p. 26. lib 1. tit. 2.)

Among us there is but one species of written law (*derecho*), which is the law (*la ley*). That is a general precept of the supreme power made known to the subjects that they may regulate their actions thereby. (Law 4. tit. 1. *Partida 1.*) There is not then in Spain as among the Romans a diversity as to the origin of the laws, as they all proceed from the will of the prince, but only with regard to the purpose and mode of issuing them, from whence it has arisen that there are given to them distinct names. Sometimes the law that is promulgated to us is called pragmatic sanction, at others royal cedula,

royal resolution, royal decree, circular letter; at others, lastly, royal order, and even likewise act consented to (*auto acordado*). To all these names, by which laws proceed from the prince is given their peculiar description, but not exact in all cases, some being confounded with others. Pragmatic sanction is *a royal determination that is promulgated in order that it may have the force of a general law, and in it is reformed some excess, abuse or damage introduced or experienced in the commonwealth, and it is inserted in the body of the law*; for example, that of the 12th of March 1771, in which in order to prevent the desertion of *presidarios* (criminals condemned to hard labor in a garrison) to the Moors, the garrisons are specified that are intended for their confinement, and it is directed that the time of sentence do not exceed ten years. (Law 7. tit. 40. book 12. of the Nov. Recop.)—Royal cedula is *a despatch of the king, issued by one of the councils in which some determination (providencia), is taken de motu proprio, or something is decreed on the petition of the party*. Its heading is *THE KING*, without the mention of any more titles: it is signed with his majesty's signet (*estampilla*): the Secretary of the Council to whom it appertains puts the counter-signature; it is rubricated by some ministers, and regularly it is delivered to the party. Such is that of the 7th May, 1740, in which it is directed that the Audience in despatches or letters requisitorial to bishops do not make use of the word *estraño*, on account of its not being sufficiently respectful to their high dignity. An example is not given of the cédulas, in which favors are granted, as they are very well known. Royal resolution is *the determination that the king takes in some case that is proposed to him*, as is that of the 10th of April 1756, by which the courts (*salas*) are declared in which suits for forcible injuries and others are to be heard. This name of royal resolution is generic, and suits every determination that the king takes. Royal decree is *an order of the king that is drawn up in the secretary's offices of despatch, and his Majesty rubricates it in order to communicate his resolutions to the tribunals within the capital, to the chiefs of the royal houses, or to some ministers*; as for example, that of the 7th of October 1796, declaring war against the kingdom of England, which was directed to the governor of the council. Cedula, circular letter or order, is *some disposition that is issued in order that it may circulate throughout one province, or in many*. Royal order is *every disposition that any one of the ministers of the king communicates by his command*.

Acts consented to (*autos acordados*) are the laws that with the consent of the king are established by the Supreme Council, as well of Castile as of the Indies: so that the force that the *autos acordados* have are derived from the approbation of the king. These are the species of written law that we know by the general name of *ley*, which, as we have already said, are not distinguished from each other in respect to origin, but only in the circumstances that we have particularised.

## TITLE. V.

COMPENDIUM OF THE HISTORY OF ROYAL LAW OF SPAIN, FROM THE  
INSTITUTES OF ALVAREZ.

## [TRANSLATION.]

As this compendium has no other object than to give to beginners some idea of our codes of law, I will only make in it a brief relation of what our authors are agreed in, without mixing in the prolix disputes which this matter generally gives rise to.

Although there are some who have wished to discover the laws by which the first founders of Spain were governed before its invasion by the Carthagenians, yet it is necessary to confess that we have nothing certain upon this subject. The most probable appears to be that they had no laws written, and that they undoubtedly were governed by those of custom, and by arbitrary decrees founded in equity and justice. It is believed that the Carthagenians would begin at least by introducing theirs into the provinces which they ruled; but even this conjecture is not altogether fixed, if we consider the short time that their government lasted, which was a little more than two hundred years, during which they were agitated with continual wars.

To the Carthagenians succeeded the Romans in the sway over Spain, and these, there is no doubt, as soon as they completed the conquest of all the provinces introduced in them their language, customs, and legislation.

In the decadence of the Roman empire of the west, Spain passed under the dominion of different barbarous nations of the north, viz. the Goths, Vandals, Alans, the Suevi, and Silingi: all of these disputed the dominion a long time among themselves, until the Goths, by the ruin or banishment of all the others, remained sole masters of Spain, which happened about the year 412 of Jesus Christ. These Goths, in the beginning of their reign, permitted the Spaniards to continue the use of the Roman laws, to which, it appears, they were accustomed, and from time to time went on establishing others. The first who gave them in writing was the King Eurico, who died in the year 483. To these were added others by his successors, and chiefly by Leovigildo, who mended and regulated those which existed, taking away those which were superfluous, and adding others necessary.

The first code of Gothic laws is the famous one published in the 12th century in Latin, by the title of *Liber Judicum*, also called *Fuero de los Juices* ó *Fuero Juzgo*, (Judge's Statutes;) and this is held as the fountain or origin of the laws of Spain. The work is divided into twelve books, also divided into chapters, and its laws are composed of edicts of divers Gothic kings, of various councils of Toledo, and

other enactments of unknown origin. There are doubts as regards the author, some giving in to Sisenando, some to Chindasvindo, and others to Recesvinto, who all flourished in the seventh century.

After the entry of the Arabs into Spain, which happened in the year 714, in which the Gothic monarchy was destroyed, the Gothic laws continued to govern for many years in the provinces which were preserved from the Moors, and in those which were got back, which were governed by them and by the general customs of the nation. The division of the provinces which were conquered from the Moors, and the difference which, in time, was remarked in many things of the individual government of each, were the cause of the variety of codes which were then established. In Castile was established, at the end of the 10th century and commencement of the 11th, by the Count Sancho Garcia, the *Fuero* called *Viejo de Castilla*, (old statutes of Castile,) the laws of which are, after those of the *Fuero Juzgo*, the fundamental ones of the crown of Castile, separate from those of Leon. Don Alonzo VII, in the Cortes of Najera of 1128, augmented and amended it, publishing, besides various laws with respect to the nobles. To these were afterwards annexed several usages and customs of Castile, and different *fazañas* or sentences pronounced in the tribunals of the kingdom, all which governed up to the reign of Alonzo XI, who desired the preference to be given to the code which he published and regulated in the Cortes of Alcala in the year 1348, known by the name of *Ordenamiento Real de Alcala*, (royal regulations of Alcala.) Lastly, the King Don Pedro, in the Cortes of Valladolid of 1351, mended and regulated the *Fuero de Castilla* in the form in which it has arrived to our times. This code is also known by the names of *Fuero de los Hijosdalgos*, (statutes of gentlemen,) *Fuero de Burgos*, (statutes of Burgos,) and *Fuero de los Fazañas*, (statutes of the sentences,) ancient laws and customs of Spain.

In the kingdom of Leon, King Alonzo V, in the general Cortes which he held in the city of that name in the year 1020, gave the statute which he called of Leon, composed of laws established in that assembly of the government of that city and kingdom, including Galicia and the part of Portugal then conquered, all which continued to be governed by them until the publication of the code called *Fuero Real*; and although the aforesaid two statutes of Castile and Leon were established in both these kingdoms, the laws of the *Fuero Juzgo* continued also to be observed in the provinces more or less respectively, in every thing relating to common law, until with time the observance of them began to cool, principally in Old Castile: but if here their vigor decayed, it was recovered throughout the whole of New Castile, and the provinces which continued to be conquered from the period of the reign of Alonzo VI, up to the beginning of that of Alonzo the Wise, which monarchs gave the laws of this code to the conquered people for their government in all that belonged to common law.

King Alonzo X, called the Wise, being desirous of annulling the



statutes of population and conquest and the general ones of Castile and Leon, in order to avoid the confusion and even complication of such a multitude of different laws in each province, ordained and published, in the year 1255, the *Fuero Real*, known also by the names of the Book of the Councils of Castile, Statute of the Laws, and Statute of the Court, because by it were chiefly decided the processes in the tribunals of the court, and he ordered that the laws therein should be the general and only ones in all his dominions; but the nobles and the people, particularly of Castile, finding out that their ancient statutes and privileges were by it destroyed, they made their complaint, and recovered them in time of the same Don Alonzo, when among these the observance of the *Fuero Real* ceased, but it was generally in use in Estremadura, Algarva, Andalusia, kingdom of Murcia, &c. The same complaint was made by the councils of the cities and towns of the crown of Leon in the time of the discords of the Infante Don Sancho with his father the same Don Alonzo, when the re-establishment of the laws of the statutes of Leon and of the *Fuero Juzgo* was agreed upon among other things.

The *Fuero Real* was not without many defects, and on this account, and for its greater clearness and intelligence, it became necessary to form the explanations called *Leyes de Estilo* (laws of the age) to the number of 252, by the authority of the same King Don Alonzo, of his son Don Sancho, and of Don Fernando el Emplazado, as it is declared in the prologue. These were published at the end of the 13th century or beginning of the 14th, and some of them are found inserted in the New Recopilation.

After the *Fuero Real*, follows the celebrated code of the *Partidas*. The prologue to this work informs us that the King Don Alonzo the Wise undertook it by order of his father, Fernando, in the year 1251, and fourth of his reign, and that he finished it in seven years afterwards. These laws were not in practice until the time of Alonzo XI, (about the year 1348,) who, by the law 1, of the 28th chapter of his ordinance of Alcala, published and gave them force after they were mended and corrected by him to his satisfaction. The same appears in law 3, tit. 1, book 2, of the New Recopilation. It is considered as certain that the cause of such a great delay in the publication of this code was the disturbances, wars, and other most important matters which occurred in the reign of Don Alonzo the Wise and the two following.

The *Partidas* was composed in a great measure of the laws of Roman codes, of chapters from the canonical law, and authorities of the holy fathers. It is evident that they likewise contain many ancient laws of the kingdom, and that the customs and statutes of the nation were consulted, the desire being to issue a perfect legal code, and peculiar to our Spain. But this so important object was not attained completely.

Don Alonzo XI, desirous that all his dominions should be governed

by one and the same laws, and in view of what he had promulgated in the Cortes of the royal city of Segovia, formed in the Cortes of Alcala, in the year 1348, the *Ordenamiento de Leyes* (ordinance of laws), known by this name, ordering that these should govern in his dominions in preference to the ancient codes; and, after them, those of the municipal statutes of the cities, and those of the parties after he had corrected them; and this was renewed by Enrique II, in the Cortes of Toro, in the year 1369, and by Queen Donna Juana, in the law first of Toro, which is found inserted in the New Recopilation. Of this code, almost all the laws passed, in like manner, into that Recopilation, either entire or with some slight alteration.

From the laws of this code, and those which were promulgated by the kings, the successors from Don Alonzo XI, down to the Catholic kings, was formed that which we know by the title of Royal Ordinances of Castile, and also that called Royal Ordinance. It is composed of various laws, some loose, some found in the Fuero Real, *Leyes de Estilo*, and Ordinance of Alcala, and is divided into eighty books. It is thought that its author, Alonzo Montalvo, undertook this work by order of Fernando and Isabella, as he himself says in his prologue: but there never was a law issued to put in force this compilation, and, therefore, its laws have no other than the merit they have acquired in the original.

After the collections just related, followed another which is called the New Recopilation. This was concluded and published in the year 1567, in two volumes comprehending nine books, having in them the laws which appeared in various pamphlets, and others which were found loose. In the later editions made in the years 1581, '92 and '98, 1640, 1723 and 1745, there were added many laws, established in the intermediate time from one edition to another; so that, in that of 1745, there was added a third volume, in which, under the name of *Autos Acordados del Consejo*, (acts agreed upon in council,) were included more than 500 pragmáticas, cédulas, decrees, orders, declarations and resolutions of the king issued up to that year; all which were distributed in the same order of titles and books contained in those of the volumes of the recopilated laws. With the augmentation of 26 laws and 12 decrees, appeared other three editions in the years 1772, 1775 and 1777; the public being promised, in another volume separate, by way of supplement, the great number of cédulas and royal decrees, and acts agreed upon since the year 1745.

Latterly has been published another edition of the same Recopilation, not in the method and order of the old one, but in a new form; taking in the useful laws contained in the first, and adding more than 2,000 dispositions appertaining to them, from the year 1745 up to 1805. This collection, which is divided into 12 books, was approved and ordered to be observed, by King Charles VI, with the title of *Novisima Recopilacion de las Leyes de España*, by a royal

cedula of 15th July, 1805, which is found at the beginning of the work.

The epochs being known of the promulgation of all these codes, and the principle being established, that "later laws destroy the former," the relative value will be known of all these parts of our legislation; and it will be seen by what laws judgment must be had in the various cases which occur. But in order to proceed in so important a matter according to the tenor of the laws, see the law 3, tit. 2, book 3, of that newest Recopilacion.

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## TITLE VI.

### ORDENANZA DE INTENDANTES.

MOVED by the paternal affection which all my subjects deserve from me, even the most distant, and by the anxious desire with which, since my exaltation to the throne, I have endeavored to equalise the government of the great empires which God has committed to me, and put in a state of order, happiness, and defence, my extended dominions of both Americas. I have resolved, after well-founded reports and mature deliberations, to establish in the kingdom of New Spain provincial intendants, and of the army, in order that, being clothed with authority, and having competent incomes, they may govern those settlements, and the inhabitants, in peace and justice, as far as is entrusted to them; and they are charged by this instruction, that they may take care of the polity, and collect together the lawful interests of my royal exchequer, with the integrity, zeal, and vigilance, which are prescribed by the wise laws of the Indies, and the two royal ordinances which my august father and King, Don Ferdinand VI, published 4th July, 1718, and 13th October, 1749; which prudent and just rules I wish to be observed exactly by the intendants of said kingdom, with the amplifications and restrictions which will be found explained in the articles of this ordinance and instruction.

ART. 1, Orders the division of that empire into twelve intendancies by name, and continues, "each of these intendancies will comprehend the jurisdictions, territories, and districts, which will be respectively assigned to them at the end of this instruction, which instruction will be delivered to the new intendants which I may elect, with the corresponding titles, (which, for the present, will be despatched by the secretary of state, and universal affairs of the Indies;) for I reserve always to myself to name, and for the time I think proper, for these employments, persons of accredited zeal, integrity, intelligence and good conduct, seeing that in them I shall rest from my

cares, committing to them the immediate government and protection of my people.

ART. 2. The viceroy of New Spain must continue in the fulness of his superior authority and powers of all kinds which are granted to him by my royal title and instruction, and by the laws of Indies, in quality of governor and captain general in the district of that command; to which high employments is added that of president of the audience and chancery of the capital city of Mexico; but leaving the superintendence and regulation of my royal exchequer in all its branches and products to the care, direction, and management of the general intendency of the army and exchequer, which is to be erected in said capital, and to which the others of the province will be subordinate, which I order, also, to be erected by this instruction.

ART. 3. The viceroy to give currency to the despatch and authority of the intendant.

ART. 4. The superintendency which is thus to be exercised by the said intendant general of the army is understood to be delegated from the general one of my royal estate of the Indies, which is invested in my secretary of state and universal affairs of said Indies; and for the just purpose of procuring to the said superintendent sub-delegate, some relief in his important duties, and to assist at the same time this establishment of intendencies by uniting the direction of all, for the purpose of making uniform its government, as far as is permitted by the difference of those towns and provinces, I ordain and order this superintendent sub-delegate, with the approbation of my viceroy to establish immediately in the capital of Mexico a superior *junta* of my royal exchequer, to which he must unite as president, the best being composed conformably to law 8. tit. 3. lib. 8. of the regent of that audience, the fiscal, &c.

ART. 15. The intendant general, and every one of those of province, must have a second, a lawyer, who may of himself exercise the jurisdiction in matters forensic, civil and criminal, in the capital and in his particular quarter, and who may be, at the same time, assessor in ordinary in all affairs of the intendency, supplying the place of its chief in his absence, sickness, or visits to his provinces, or any other cause; it being understood that the assessor of the intendant general must be assessor, also, in every thing relating to the superintendence of my royal exchequer, which employs him, supplying the place there, also, in case of defalcation, sickness, or absence. And that the said vice intendant may possess all the requisites which his situation demands, they must be examined and approved by my consuls, chanceries, or audiences, and shall be named by me with the consultation of my chamber of Indies, &c.

Then follow various clauses relating to their duty in watching over the general police and good government, agriculture in all its branches, cotton, silk, cochineal, &c., public roads, temples, streets, &c.

ART. 75. Being already explained in general the obligations of the intendants *corregidores* of their provinces, and that of making their

subaltern officers fulfil theirs as respects the administration of justice, and political and economical government, upon which depends the augmentation and happiness of my subjects, they must preserve the following rules as regards the third class belonging to their cognisance, which is that of my royal exchequer.

ART. 76. The direction in chief of my royal rents which are established, or may be established, in the circuit of my said kingdom, and that of whatever dues may belong now and always to my royal fisc, in whatever manner, will be conducted in future under his exclusive inspection and cognisance, with all accompanying, dependent upon, or annexed to it, without distinction, whether the branches be administered for my own account, or be rented, or be in the name of others; and I ordain and declare, besides, that the forensic jurisdiction granted by law 2. tit. 3. lib. 8. to the royal officers for the collection of the effects and branches of my royal treasury, it is understood now united in, and transferred to, the intendants in their respective provinces, to the absolute exclusion of those ministers of the royal exchequer, who will remain with this title for the future, together and individually, with that of contadores and treasurers, although, always subject, as heretofore, to securities and a joint responsibility as far as this regards them, and subordinate to these, my new magistrates, looking to them as their chiefs and superiors. Nevertheless, these ministers will take in their charge the obligation which is now held by the royal officers to administer and collect what belongs to my royal fisc, in the branches which are now in their charge, exercising all the co-active economical powers which may effect the one and the other, with the difference that, in cases where it may be necessary to proceed judicially against the debtors to the fisc, they may proceed to prosecute and follow up the demand in my name, before their respective intendant or sub-delegate, so that, using the jurisdiction which is thus declared to them, they may despatch the orders in course, and conformable to justice.

ART. 77. In order to effect this, and that the orders and decrees of the intendants in respect to this branch, and that of war, may be carried into execution in all the districts of their provinces by persons duly authorised, they will nominate as well in the head cities of the governments, political and military which are suffered to remain, (except those of Yucatan and Vera Cruz,) as in the other cities and towns which are well populated, and especially where there may be a treasury of my royal exchequer, although this may be of an inferior class. Sub-delegates for the forensic part only of these two departments, in the understanding that, in the head cities and districts of the said governments, the said appointment must fall upon the governors themselves, as is ordered in the 8th article; and, also, that in the other places indicated, and their respective territories, in no event must the *alcaldes* be elected, and less the *contadores* or treasurers, or others, administrators of any branch of my fisc; but be confided to persons private and of the best repute and necessary standing, by

previous report of persons who can give it with due acquaintance, declaring, as I now declare, that the military, as far as their appointment of sub-delegate to their respective intendant, must be subordinate to him, and that the faculties of the said sub-delegates, and those of the others ordered by the 12th article to be established, as far as regards the aforesaid two branches, are only to extend to causes which they may set on foot themselves, or may be passed to them in summary by any lower officers of my custom-house, until they are brought to a point for sentence; for in this state they must be remitted to the intendant of the province for pronouncing, with the advice of his assessor, what may appear just.

ART. 78. As regards the exercise of the forensic jurisdiction in the processes and affairs of my exchequer, the intendants must take cognisance exclusively, and to the absolute separation of all other magistrates, tribunals, and audiences of that kingdom, with the sole exception of the superior junta of exchequer; and this will also actuate in all causes in which my treasury may have any interest or any injury, or which may belong to any branch, or any dues which may be in administration or rented, as well in respect to recoveries, as in all incidental matters, so that no intendant, not even the one of Mexico, as regards his district, will admit from any one recourse or appeal, unless it be to the said superior junta in cases, and with respect to things, which admit of it, in the same manner that from the decrees of this last none can be made but to my royal person, and by the private channel of the Indies; and it must be observed that the superintendant sub-delegate must not be present when there is a motion to appeal from a sentence which he has given as intendant of province in his direct charge, neither can the assessor of the superintendancy, if it has been pronounced by his advice, &c.

ART. 81. The intendants shall also be exclusive judges of the dependencies and causes which may occur in the district of their provinces, about sales, compositions, and divisions of lands, whether realengos, or of my dominion: the possessors, and those who pretend to new concessions of them, having to represent their rights, and reduce to form their demands before the intendants themselves, in order that these, when they are duly informed of these affairs by means of a promoter of my royal fisc, whom they shall appoint, they may determine upon them according to right, with the advice of the usual assessor, and admit appeals to the superior junta of exchequer, or render an account to this, if the interested do not wish to appeal with the original process, when they judge this in a state for despatching the title; in order that, when it is seen by the junta, it may be returned either that it may be despatched, if no objection is made, or that, before despatching it, the alterations may be made which that junta may point out and advise; by which means, and without new impediments, the corresponding confirmations may be made, which will be drawn out by the superior junta itself, it proceeding in the matter, as also the intendants, his sub-delegates, and

the others, agreeably to what is ordained in the royal instruction of 15th October, 1754, *in as far as it is not opposed to what is now decreed by this*, without losing sight of the salutary dispositions of the laws which are therein cited, and that of 9. tit. 12. lib. 4.

ART. 83. They will likewise take cognisance in all cases of prizes, shipwrecks, vessels in distress, and vacant property, be this in whatever manner it may, as well for the examination thereof, as to put it in a way of recovery, and of applying them to my royal exchequer, the necessary steps being first adopted according to right, and giving me an account of all by the private channel of the Indies, in order that, by that way, an understanding may be had with the respective tribunals, and the decrees which may be advisable, may be communicated to the intendants themselves.

ART. 306, Gives to this instruction and ordinance the force of law; all other dispositions, establishments, customs, or practices, to the contrary are revoked; any interpretation, or amplification is prohibited, and it is ordered to be observed by all the tribunals and chiefs, secular and ecclesiastical, and by all and every one whom it concerns, avoiding all discussion or hindrance.

*December 4, 1786.*

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## TITLE VII.

### CUSTOM OR UNWRITTEN LAW, FROM EL ABOGADO AMERICANO.

*"Custom is unwritten law that has been introduced by use.* In order to be such, and not vicious, (corruptola,) it is required that the usage be that of the people, or of the greater part of them, for the space of 10 years, and that it be in harmony with the general utility. Two uniform judgments or sentences are one of the proofs of custom. A legitimate custom has the force of law; derogates the former law that is contrary to it, and interprets the doubtful law; from whence it is said that there is a custom beyond the law, contrary to the law, and according to the law."

Manual del Abogado, 1 vol. p. 3.

Partida, I. tit. 2, treats of usage and custom, and accords with the above.

Manual del Abogado, America, lib. 3, tit. 5, vol. 2, p. 16.

SEC. 1. Definition of judge.

SEC. 2. Who cannot be judge.

SEC. 3. What age is requisite in order to be judge.

SEC. 4. Concerning the assessor.

SEC. 5. The judge is *ordinary* or *delegated*. Ordinary is *he who exercises jurisdiction in his own name by the proper right of his*

*office. Delegated is he who exercises jurisdiction by order of the supreme authority, or of the ordinary judge who commissions him for some particular case.*

SEC. 6. Jurisdiction is *the power of taking cognisance of, and deciding civil and criminal causes.* With it goes *united empire*, (*el imperio*), which is *armed power*; that is to say, *the power of causing the decisions to be executed*, and it is divided into *absolute and mixed*: *absolute empire is the power of administering justice in causes in which the punishment may be inflicted of death, loss of member, or perpetual banishment*: *mixed is the power of taking cognisance of, and determining civil causes, and criminal causes, in which the sentence is less severe than those above mentioned.*

SEC. 7. Jurisdiction is divided into *ordinary, delegated, and prorogated.* The ordinary, which is also called *proper*, is *that which belongs to the magistrate by the proper right of his office.* The delegated, which is also called *mandada*, (literally, *commanded or sent*), is *that which one exercises in the name of the ordinary judge, in the form and with the limitations that he grants for a certain and particular case.* Lastly, the prorogated is *that which, by the express or tacit consent of the parties, is extended to persons or causes, to which it was incompetent.*

SEC. 8. It is an axiom that the delegate cannot sub-delegate; but the judge who is delegated by the supreme authority may do it as if he were the ordinary judge; and the judge delegated by the ordinary may also sub-delegate the causes, provided they have been litigated before the latter.

SEC. 9. There are some things which cannot be delegated except under certain limitations. In the first place, the absolute *empire* (*el mero imperio*) cannot be delegated, except on account of the just and necessary absence of the delegating judge, and then only until sentence, which must be given by him. In the second place, neither can be delegated the appointment of guardians or curators, nor causes in which the matter in controversy exceeds the value of three hundred maravedis of gold, except in the case mentioned, of absence, and that of a great pressure of business in the public service. Law 6, tit. 10, book 11, of the Novísima Recopilación, permits the ordinary judge to appoint a substitute, if he be sick or absent, for any lawful cause; and if there be regidores in the town, what is observed is, that in such cases, the first regidor exercises the jurisdiction, and, in default of him, the second, &c.

SEC. 10. Delegated jurisdiction is ended: 1. By the revocation of the delegating judge. 2. By the death or loss of office of the delegating judge before the citation. 3. By the promotion of the delegated judge, if he equal or exceed in rank the judge by whom he was delegated. 4. By the lapse of a year without making use of the delegation. 5. By the death of the person delegated, unless it was not granted to him as an individual, but as holding some dignity or office; for, in this case, the successor will continue in the dele-



gation, because the office never dies. 6. By the conclusion of the business or time for which it was granted.

SEC. 11. Jurisdiction is prorogated by the express or tacit consent of the parties, as was said in the definition: by the *express*, as if two persons agree to submit themselves to a judge, who, in respect to both or one of them, was not competent, provided the cause can be litigated (*puedo actuarse*) before him; by the *tacit*, as if the defendant contests the suit before an incompetent judge, without objecting the incompetency, or as if the plaintiff resorts to a judge incompetent as respects himself, and before that judge a cross demand is set up by the defendant, to which cross demand the plaintiff will be obliged to plead. It is disputed whether prorogation can be extended from place to place, and from time to time; and the opinion that denies that it can, appears more probable, because the judge, when out of the place or time for which he is appointed, is no more than a private person without any jurisdiction.

SEC. 12. It is also usual to divide jurisdiction into *contentious*, or compulsory and *voluntary*. The former is *that which is exercised over even those who are not willing*; that is, the jurisdiction which the superior or judge has over those subject to him; the latter is, *that which is exercised between those who are willing, without justice being formally administered*; as when there is made before the judge any adoption, manumission, emancipation, or other similar acts. The first is, strictly speaking, jurisdiction, the second not so. Some call the prorogated jurisdiction voluntary. Lastly, there is another division of jurisdiction into *exclusive* and *accumulative*: exclusive is that which deprives other judges of the cognisance of the cause, as that which is possessed by one delegated by a judge superior to the judge of the district; and accumulative is that by which a judge may take cognisance beforehand of the same causes as another, that is to say, anticipate him in taking cognisance of the same.

SEC. 13. As, in order to exercise jurisdiction, it is not sufficient that one be a judge, but he ought also to be competent, it is necessary to know who is so in each cause. In the first place, it is to be observed that every judge has a designated territory, within which, and not out of it, he may exercise his jurisdiction, which neither is extended to all the persons, nor to all the things within his district, because there are many which, being exempted from the ordinary or common, are only subject to some exclusive jurisdiction, as the military, that of the public revenue, (*exchequer-hacienda publica*,) the ecclesiastical, and various others, which fail not to introduce confusion, and to impede the march of the administration of justice.

SEC. 14. These principles being established, a competent judge in civil causes is, 1st, the judge of the place where the defendant is domiciled, or was when he contracted: 2d, he who was mentioned in the contract, or the judge of the place in which it was made, provided the defendant be found there when the action is commenced: 3d, the judge of the place where the things in litigation are situated:

4th, when a movable thing is demanded with right of ownership, the judge of the place in which the defendant shall be found with it, although he be a resident elsewhere unless he give sureties *de estar à derecho*: 5th, in matters of the accounts that guardians or curators ought to give, the judge of the place where the guardianship or curatorship was administered: 6th, in possessory causes of inheritances, the judge of the place where the inheritable things are: 7th, in causes where legacies are claimed, if they are specific, the judge of the place where they are, or where the greater part of the property of the deceased may be, or where the heir may reside; and if they are generic, (in kind,) or of an article which it is usual to count, measure, or weigh, the judge of the first two places indicated, or the judge of the place in which the heir commenced paying the legacies, unless the testator had designated the place.

[The remaining sections of this title are irrelevant.]

ART. 83. They (the intendants) will also take cognisance in all cases of prizes, shipwrecks, distress of ships, and *vacant property, in whatever manner it may appear*—as well for the examination thereof, as to put them in a state of value, and for applying them to my royal exchequer, taking previously the steps required necessary by law, and giving me information thereof by the private way in affairs of Indies, in order that through that channel instructions may be issued to the respective tribunals, and suitable resolutions may be communicated to the intendants themselves.

Solorzano—lib. 4. cap. 25.

ART. 23. They (the commissaries of crusade) have also tried, in order to extend their jurisdiction, to bring under their office, administration, and jurisdiction the stray cattle, and any other property lost or vacant, the owner of which is not known, and which are generally denominated Bienes de Mostrenco; and also of all those who die in the Indies ab intestate, or at least the fifth part of these. This is likewise denied to them with great reason, and even prohibited by some old cédulas of the 14th January, 1536, and 14 Feby., 1540, renewed by another of 16 July, 1614.—L. 18. tit. 20. lib. 1; L. 11. tit. 5. lib. 5. L. 6. tit. 12. lib. 8. Recop.

24. And in another, given in Lerma 28th-October, 1602, a mandate which the religious order of Merced obtained from the Nuncio of the Pope, is ordered to be recalled in its original, and sent to the Royal Council of the Indies, for this property to be exhibited to them, and applied to them alone in virtue of their privileges, and for the redemption of captives; and it assigns as the reason the cédula that it is contrary to justice, to the laws, and to the royal cédulas, *agreeably to which all the mostrenco property and effects belong to my camara and fisc.*

25. In proof of which we have many texts and authors which pronounce them, and declare them as Regalias, (L. vacantia et per tot. c. de bon. vacant. L. pen c. de petit. bon. Subl. lib. 10. tit. 10. l. 1. L. 7. 3, 8. tit. 13. lib. 6. Recop. ubi accv. et laté Sextur. de Regal. lib. 2.

cap. 9. Bocer. d. tract. c. 3. n. 26. et seqq. DD omnes per text. en. c. 1. quæ sint Regalia in feudis,) and as such they should be picked up, collected, and administered by the royal officers, as they do not belong to other than the fisc, if no especial privilege is shown by which it may appear that this has been conceded, as in Spain is held by some portions of the religious order of Merced and of the Trinity, for the aforesaid redemption of captives; and the council of the *Mesta*, so called for the stray beeves applied to it.

26. From which it follows, in the opinion of Antonio Nebrixa, (in dect. verb. *mostrencos*) the name of this *mostrencos*, when they ought to be called *Mestengos*, inasmuch as flocks without owner belong to the order of *Mesta*, whose laws dispose of the same; although Covarrubias (in thes. Linguæ castell. verb. *mostrencos*) is of opinion that they are called *mostrencos*, from the word *mostrando* (showing), because wherever they are found they must be shown, then manifested and advertised publicly, that the owner may be sought; and he not appearing within a year and a day, they remain to the king, and are applied and adjudicated to his fisc and royal camara, as is expressed in the laws which I have cited.

27. Nor in opposition to the above can it be said, that, in Spain the commissary general and council of crusade collect and administer this property *mostrenco* and ab intestate, and take cognisance and judge in the processes, because that proceeds from laws, commissions, and private instructions granted to them to that effect. These are related by Perez de Lara (see note). *But in the Indies there is no such concession, but on the contrary*, as has been seen.

28. A case in point. Book 6, chap. 6.

ART. 1. Of the property called *mostrencos*, and the cause of their being so called, I said something in another chapter, where it was spoken of whether in the Indies the collection and administration belonged to the commissaries of the holy crusade: what I have now to add is, that all movable and immovable property is held, and ought to be held, as such, which have an owner or not; or in case of having one, are lost, and without him appearing who may be the owner—after a year and a day of steps taken, of manifestations, and advertisements in looking for him, which the laws of the Recop. direct which speak of the matter, and which is treated of at length by Covarrubias, Avendaño, Juan Gutierrez, Bobadilla, and other authors, (see note,) and in particular Licté. Juan de Meneses, who, when he held the office of fiscal of the holy crusade, upon the occasion of a right to this property being claimed by some titled gentry, and the orders of Merced and Trinidad, printed in the year 1618 a very copious argument and juridical discourse upon the subject.

2. In this, his first and most judicious conclusion is, that, at the present time, this property belongs to the fisc and royal camara, like the metals, salt works and treasures, of which I made mention in former chapters; and for this, in the Recop. de las Leyes de Castilla, all these things are collected under one title, (Tit. 13. lib. 6. Recop.

*Cast.*), which says, "Of the treasurers and miners of gold or silver, or any other metal, and salt works, also property *mostrencos* and property found."

3. Because as princes sovereign are universal owners; and also for the protection of all that is held in the provinces by his vassals, as Seneca has well said, and a text which must be explained in this sense, according to Cujacio and other grave authors, (see note); when the particular owner does not appear, they introduce themselves and put themselves in his stead, and have incorporated, and do now generally incorporate, this property of *mostrencos* with their royal crown, making this of the number and quality of other *Regalias* of which they have made use, and now use, under the pretext that they want all for the good, the protection, and defence of the same provinces, and the subjects from whom it is derived, as is shown in the chapter upon feudal property, (c. 1, *Quæ sint Regalia in Feud. ibi: Bona vacantia*), which, in treating upon the said *Regalias*, comprehended this one under the name of *vacant property*. Whence Mateo de Afflictis, J. M. Novario, and all who comment upon him, make great mention of this; and also Peregrino, Regnero Sextino, Henrico Bozerio, Camilo Borrelo, and the rest of the authors who have written about them and others at every step, (see note.)

4. These speak of the customs which exist respecting this in all nations, and the name which is generally given to this kind of property, and the various species into which it is divided, all of which is embraced in one law of the kingdom, (Dict. L. b. tit. 13. lib. 6. Recop. *Cast.*) in these words—"Every thing which may be found in any manner *mostrenco*, abandoned, must be delivered to the justice of the place or jurisdiction in which it may be found, and must be kept a year; and if the owner does not appear, it must be given to our *camara*." Not content with having said *every* and *thing*, which are words or expressions so universal and general, as is notorious, (see note,) it added, "in whatever manner *mostrenco*, abandoned," which is more universal still, and in its nature, by all the rules of justice, extend the disposition to all cases and to all things found in whatever manner, and comprehend not only things alike, but even those which are not so, or may appear greater than what is expressed; and the same is shown in the following laws, which, by only saying things found and *mostrenco*, it appeared to them to have said all that was necessary to comprehend all those which should be found without an owner, and whose ownership was uncertain, as well animate as inanimate, for it is not permitted, nor are distinctions admitted by the laws which speak in words so general.—(L. de pretio cum vulg. de publiciana in rem act.)

5. And even more to the purpose is a whole title of the *ordenamiento real*, (tit. 12. lib. 6;) from which some of the laws of the Recop. have been taken, which title satisfies, by having but a sentence "of the things found, which are called *Mostrencos*;" and with this it was judged to have comprehended as many species of these as

could be imagined, and it put us in the line of another doctrine, which teaches (see note) that the intention of the statute is declared by the words of this sentence:—from it, it is lawful to form an argument whereby to explain it.

6. And coming nearer to the municipal justice of our Indies, the same and in the same form is declared, and ordered there to be observed, by the cédulas of the years 1536, 1540, 1602, 1614, which I have cited in the chapter aforesaid, in conformity to which the cruzade and the religious order of Merced are prohibited from interfering or disturbing this property, giving for reason that all belongs to the *camara* and *fisc* of his Majesty.

Solorzano, book 3, cap. 30.

ART. 20. If the *fisc* is the plaintiff: if it can lay an action in the royal audience.

ART. 21. Reasons in favor; also the persons and communities who cannot possess Indians. Recop. lib. 6. tit. 8. law 12 and 13.

ART. 22. Yet I assert the contrary in the case where a private individual, from whom the *fisc* demands, or claims to take away the *encomienda*, should have some lawful, or at least seeming cause for possessing it: for I find that the meaning is very general of the aforesaid for as many as plead, or would wish to plead about *encomiendas* in possession and those in property, that they be remitted to the supreme council of Indies. And as this order must be observed when the individual claims against the *fisc*, so also when the *fisc* claims from the individual: for these actions should not be unequal or operate defectuously as the laws say, and their doctors, (see note;) and the *fisc* must not disdain to have its rights equalised with those of an individual, and avail itself of the common law to both, only in cases where it is especially privileged.

ART. 23. In feudal questions of lordship, this and the vassals plead in one tribunal. The *fisc* uses that common to both.

ART. 24. And to this the cédulas which I have spoken of to the contrary are not repugnant, nor that the *fisc* never is used to litigate when it is not of possession; for those have their mark, and are used only in the cases which they mention, viz: where the *fisc* is holder, or enters with this express intention, and he with whom it litigates is not the possessor, but an intruder or unjust detainer of the *encomienda* without any title, not even pretended. In such case it is right that the royal audiences restore it to the *fisc* instantly, as they can also do, and ought to restore to all individuals who have been ejected in fact, agreeably to the law of Malinas and its commentaries, which I have cited.

ART. 25. And in this view the *fisc* can oblige all and whatever possessors of *encomiendas* by an edict and public advertisement, or in any form which may appear to him most convenient, to appear and exhibit their titles, agreeably to a cédula of 1551, in chap. 18, of the instructions to the viceroy of Peru, (see note,) of which mention is made by Antonio de Leon. For although, in general, nobody is obliged

to exhibit to another the title of his possession as the law ordains, (see note,) this is limited to those who pretend possession of things of others, or when opinion is against them; and consequently, in any case where defence is made under pretext of feudal, gratuitous, or censual right, they are obliged to exhibit it according to the common opinion of the doctors, (see note,) since it is the foundation of their intent; and not making the exhibition, the presumption is against him that all things are presumed to be free; so in matters of jurisdiction, says Gregorio Lopez and many others, (see note,) that for the reason that the king enters by founding his claim upon all his dominions, even upon lands of lords and of prelates, he can ask these, and compel them to exhibit the titles by which they claim their rights.

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## TITLE VIII.

### POWERS OF VICEROYS, CAPTAINS-GENERAL AND GOVERNORS, FROM SOLORZANO'S POLITICA INDIANA.

[TRANSLATION.]

#### *Book 3—Chapter 5—Article 31.*

Because, as Carolo Pascasio says, and Calisto Ramirez, subjects have no obligation to investigate or know the orders and instructions of a secret nature which are given to the viceroys, in which bounds are put to their power, for, if they do not obey them, they are subject to reprehension or punishment; but what they may perform must be sustained, because they are in quality of factors or substitutes to royalty, for whose actions he who named them is accountable, and put them in that charge which is indeed conformable to right.\*

#### *Book 3—Chapter 9—Article 14.*

But although this, as I said, proceeds with reference to common law, and it is fit that the viceroys and governors of the Indies never cease to bear it in mind, still, as regards the municipal duty of these, the whole, or almost the whole, is left to their discretion and prudence; because, in the conflict or concurrence of these *cedulas* (royal provisions) and orders *de providende*, they have not to attend so much to the dates and orders of these as to that which may appear for them most convenient to execute: as also, what the merits and services of those who have presented them ask and require, and the state of things in their countries or provinces, the government of which is com-

\* L. 3. ff. de publicam, § fin. inatit. de oblig. quæ ex quasi dedic. Cabedus et alii apu Mc. d. c. 4 n. 78.

mitted to them. It is thus recommended to them in the royal cédulas which I noticed in the beginning of this chapter, and others of the years 1567, 1605, 1610, directed to the viceroys, at that time, of Peru, Toledo, Monterey, Montesciaros.

*Book 3—Chapter 10—Article 25.*

This calls us to another question not less frequent and difficult, upon which I have seen some suits adjourned from a discord of opinions—I mean who is to have the preference of two, of whom one obtained by favor from the court a special *encomienda* (Indian tribute) by dispensation made to him by his majesty; and another obtained the same in the Indies by grant of the viceroys or governors, having there power to do it, without having notice of the other from his majesty.

I judge we can examine and easily solve this question as respects the right, only by informing ourselves, and looking attentively as to the fact of which of these grants of the same objects preceded the other; for, if we suppose the vacancy to happen in the Indies, and the viceroy or governor, who *there is, as the king himself*, made the appointment lawfully and immediately, and in exercise and use of his faculties, gave the title and possession thereof to some well deserving person, we must come to the resolution that the grant of this same *encomienda*, which afterwards may be found to be made by the king in his court, is of itself null and of no value or effect, because there is no vacancy to supply, as we said in chapter five, on account of its being previously occupied, and the grant made in proper time; and the concession made in the name of the king, in virtue of authority sufficient, and his own commission, must be, and must remain always firm and valid as if himself had made it. Of this we have an express text in speaking about what is done by the procurators of Cæsar, (l. 1. de off. Proc. Cæsar,) and others, still more expressive, which decide upon what we are saying upon the subject of gifts.\*

*Book 5—Chapter 12—Article 1.*

Although it may seem that enough was provided for the maintenance of peace, and for justice, in the provinces of the Indies by the creation of audiences and magistrates, of which mention has been made in the preceding chapters—still, as those went on peopling and distinguishing themselves so much, it became meet, at least, in the principal parts, such as Peru, New Spain, &c., to place governors of greater weight, with the title of viceroys, who should also act as presidents of the audiences there residing, and who should, separately, have in charge the government of those extensive dominions, and of all the military bodies which might there arrive, as their captain general; and should act, watch, and take care of all which royalty in

\* C. si is qui, 12 de prob. lib. 6, vide verba apud Mc. d. e. num. 35.

person would act and take care of if there present; and should be understood to be suitable for the conversion and protection of the Indians, the spreading of the Holy Word, the political administration, and for the peace and tranquillity, and the increase of things spiritual and temporal.

ART. 3. And truly, the provinces of the Indies being, as they are, so distant from those of Spain, it became necessary that in these, more than any other, our powerful kings should place these images of their own, who should represent them to the life, and efficaciously, and should maintain in peace and tranquillity the new colonists and their colonies, and should keep them in check, and in proper bounds, by such a dignity and authority as the Romans did when they spread theirs over the best part of the globe, dividing the most remote into two kinds, which they called *cousular* and *pretorean*—the emperors themselves taking the government of the principal of these in their own hands, and charging the Senate with the second; and giving to those who went to govern the first, the name of proconsuls, and to the others that of presidents—about which, we have entire chapters in law, where the commentators speak of this more extensively, and an infinity of authors.

ART. 4. Some of those observe (in terms of which we speak,) that to those proconsuls or presidents may be likened the viceroys of the present day, although this is not agreed to by Pedro Gregorio, who says that the authority and power is greater of the viceroys, and that, in France, very rarely was such a dignity granted, except to a brother or child of the prince, or one designated as successor to the empire; and I find Bobadilla of the same opinion—afterwards Alciato and others, whom he names.

(*See references.*)

ART. 6. But however this may be, (their similitude to other titles,) it is of little importance. What I reckon as certain is, that the person to whom there is the greatest likeness, is to the kings themselves who appoint them and send them out, generally choosing them from titled gentry, and the most worthy in Spain of his chamber counsel, causing them, in the provinces which are entrusted to them, to be looked upon, as I have said, as their own person—to be their substitutes: for this is properly signified in the Latin word *proreges*, or *vicereges*, which, in the common language, we call viceroys; and in Catalonia and other parts they are called *alterego*, on account of this ubiquity of likeness or representation, which is also treated of in some chapters of common law, and the laws of the *Partidas*; and which are described extensively by Budeo, Casaneo, and other authors.

(*See references.*)

ART. 7. From which it happens that, regularly, in the provinces which are entrusted to them, and in every case, and in all things



which are not especially excepted, they possess and exercise the same power, authority, and jurisdiction, with the king who names them; and this not so much as a delegation as in the common way, as is proved by the texts, and by the doctors already quoted, and a number of others which are cited by Avendano, Humada, Cordan, Tollada, Bobadilla, Calisto Ramirez, Berarto, and others of the moderns, and, in particular, Juan Francisco de Ponte, and J. M. Novario, who have written especial and copious treatises upon the office and power of the viceroys, and who reprove Fontanela, who, in too general terms, calls it delegated: and to these I add the latest, Marco Zuerio, who, in one of his political emblems, expressed well this representation with the painting of a seal, which, the wax being warm, receives, in which it is stamped or printed, with the addition of the letters for motto, *alter et idem*; and he applies it to this communication and representation which the kings make of their majesty to the viceroys whom they send to govern provinces where themselves cannot be present, they remaining with their power entire, although it be transmitted or transferred from one to others.

ART. 8. And, approaching nearer to the municipal right of our Indies, almost every thing which relates to this great power and dignity of viceroys will be found in the cédulas which I have already quoted, and, in particular, that part regarding their representation in one issued at the Escorial 19th July, 1614, from which is inferred "that, to the viceroys, there is and must be observed the same obedience and respect as to the king, without putting the least difficulty, contradiction, or interpretation, under the penalty of those who should contravene, incurring the punishments ordained by law, who do not obey the royal orders, and the others which are there marked and related."

(See references.)

ART. 9. And all this is very right; for, wherever the representation of another is given, there is the true copy of that other, of which the image is produced or represented agreeably to the understanding of a text, and, as Tiraquelo explains at great length, and other authors; and, in general, this representation is more resplendent when the viceroys and magistrates are further removed from the masters who influence and communicate it to them, as Plutarch finely expresses it by the example of the moon, which becomes of greater size and splendor in proportion as she removes from the sun, which is the object which gives her that splendor.

ART. 10. From all which I infer, in the first place, that this viceroyal power and dignity being of this nature, and so great as has been said, and that it has to be exercised in so many, and such arduous affairs and cases as occur generally in the Indies, the prince ought to look well to the persons he chooses and sends upon these employments; since, even in those of oidors and other ministers of less note, I demonstrated the necessity of the same caution in other chapters;

and, as to governors who are sent to new provinces or warlike, this is adverted to in elegant expressions by Cassiodoro.

*(See references.)*

ART. 11. And the Padre Josef de Acosta is not less elegant in treating of the qualities of the viceroys, when he says that, if the Romans took so much pains to send to their remote provinces, and such as were lately conquered, men of the first choice, perfect and experienced, whom they knew, and scarcely trusted others than the very consuls of their own city—much greater pains are required with viceroys for the New World, which is so much farther distant from the eyes of their kings, and is composed of so many different nations and mixtures of people, and comprehends so many new provinces, in which every day there occurs some new and unthought of affairs—where mutiny and sedition are contemplated—where sudden and dangerous changes are experienced—where municipal laws are not known, or not found sufficient for every case: and, if we wish to make use of the Roman code, or the Castilian, these do not square with those of the country—and the very state of the republic is so inconstant, varied, and different in itself every day, that things which yesterday might be judged and considered as very straight and regulated, to-day would become unjust and pernicious.

*Book 5—Chapter 13—Page 376—Article 2.*

The first established rule and sentence is, that viceroys can act and despatch in the provinces of their government, in cases which have not been especially excepted, all that the prince who named them might or could do if he were himself present; and for this reason and cause his jurisdiction and power must be held and judged more as a thing established than delegated.

*(See references.)*

ART. 3. All which is indeed conformable to the purpose for which these honorable and pre-eminent employments were instituted, which was, as it appears, that subjects who live and reside in such remote provinces may not be obliged to go and seek the king, who lives so far off; and that they may have near to them a substitute of his, to whom they can apply; with whom and of whom they can treat: they can ask and obtain all which they might expect from the king himself, or obtain from him even in those things requiring power, or especial provision, as, after Andres of Milan and Francisco de Ponte, is explained well by Capiblanco, Mastrillo, Gambacurta, and others, who treat of this. And speaking of this, the lawyer Ulpiano dares to say, in an absolute style, “that there is no case in the provinces which cannot be despatched by them;” and the same doctrine, with many examples to confirm it, are taught to us by many other texts of law, civil, canonical, and royal.

*(See references.)*

ART. 4. In particular passages relating to viceroys of the Indies, we have an infinite number of cédulas which decide this and assert the same, which can be seen in the first volume of those in print from page 237; and, besides these, another still of a fresher date given at St. Lorenzo, 19th July, 1614, which orders, generally, "that the viceroys, as holding the place of the king, can act and decree in the same manner as the royal person, and must be obeyed as one holding his authority, without replying, without interpretation, under the penalties to which are subjected those who do not obey the royal commands, and such laws as may be imposed by them; and that which they ordain and command, the king will hold as firm and valid."

*(See references.)*

ART. 5. All which is certain, and in such manner that, even when they exceed their powers or secret instructions, they must be obeyed like the king himself, although they may transgress, and are afterwards punished for it, as I have already said in other chapters; and Mastrillo expresses it at some length, in speaking of the practice of these secret instructions, and the form which must be observed in them. And the reason of this is, because we must almost presume in favor of the viceroys; and what they do we must consider as done by the king who appointed them, as is said in many texts, and by several authors.

*(See references.)*

*Book 6—Chapter 12—Page 482—Article 13.*

And by another cédula in Madrid, 27th October, 1535, it is permitted that the ancient conquerors, and *other well deserving* persons in the Indies, be remunerated and accommodated with lands and possessions there, and that, amongst these, the most worthy should be preferred; which cédula is very just, and now can be enforced by the viceroys without contravening that of 1591, *when the merits were worthy of satisfaction*, because the interest of kings is not small to give compliance to it, nor is it new to give a premium to old services, as I have said in other places.

## TITLE IX.

## GOVERNMENT OF THE ISLAND OF CUBA.

The island is divided into two provinces, whose capitals are the Havana and St. Jago de Cuba.

The governor and political chief of the former is captain-general of the island, and that province extends to Puerto Principe.

The governor of the latter has jurisdiction over the remaining part of the island, which embraces the province of Cuba, whose government is given to a military officer, who is political chief in his province; and, in military matters, is subordinate to the captain-general.

Both governors have jurisdiction in military controversies only.

His Ex. Don Juan Ruiz de Apodaca, in compliance with a law of the 9th October last, (1812,) regulating the powers of courts, declared that his jurisdiction, civil and criminal, in ordinary cases, was at an end, and ordered all causes then pending before him to be transferred to the auditor, Lt. Gov. Leonarde del Monte, to be determined according to the law referred to. Military jurisdiction was reserved to the governor.

The former governors of Cuba were governors of the whole island. In the time of Pedro Valdes it was finally determined that the captaincy-general of the whole island should be annexed to the governor of Havana, leaving the governor of the province of Cuba political and military governor in the district under his command.

In both governments there are six lieutenant captaincies. In that of the captain-general are those of Puerto Principe, Cuatro Villas and Filipinas. In that of Cuba, those of Baracoa, Bayamo and Huguin. These lieutenants exercise jurisdiction in military causes, with appeal to the captain-general; but not in civil matters.

There is, in this branch, a superior tribunal of secondary instance, which is the audience sitting at the city of Puerto Principe, and composed of two chambers (*salas*) and nine judges (*ministros*). It was formerly presided by the captain-general of the island, but now by its regent.

In all the towns and villages of the island, there are corporations, *ayuntamientos*, elected annually by the people, agreeably to the constitution. And when judicial jurisdiction is exercised by them, and the political and economical government by the judge of *letters* and the constitutional *alcaldes*, the circuit judges and district captains are suppressed.

The *ayuntamiento* now consists of two *alcaldes*, elected annually;

twelve regidores, one half renewed annually; two attorneys, (*procuradores*) one renewable annually; one secretary. This body is presided by the captain-general of the island.

The principal tribunals are:

The captaincy-general, with jurisdiction in military matters only.

The courts of the judges of letters, (*juezes de letras*), of whom there is one for every twenty-five thousand souls. They have original jurisdiction in civil and criminal matters.

The court of constitutional *alcaldes* having concurrent jurisdiction with the last mentioned, but exclusively in cases first brought before it (*a prevención*): appeal lies from these to the territorial audience.

The tribunal del consulado, having jurisdiction in mercantile matters. It consists of a prior, two consuls, an assessor, and a clerk. From this, appeal lies to the tribunal of *alcaldas* in matters of considerable amount. This is presided by the captain-general, and consists of two members, whom he chooses from among four who are proposed by the parties, and one assessor. The clerk of the consulado serves also in this.

The administration of the royal treasury of the island is presided by the superintendant general residing at Havana, and two intendants of provinces in Puerto Principe. The superintendant is president of the tribunal of accounts, of the board of tythes, of the superintendency of the *cruzada*, judge conservator of the national lottery. He presides in the tribunal in the trial of suits concerning the public treasury; and from this, appeal lies to the superior board, which is presided by the superior accountant instead of the court of account of Mexico, where such appeals were formerly carried.

The tribunal of superintendence of tobacco is composed of a superintendant, assessor, fiscal and clerk. Appeal lies from it to the supreme court of justice in Spain.

The tribunal of marine, presided by the commandant general.

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## TITLE X.

### CONSTITUTIVE ACTS OF THE MEXICAN FEDERATION.

*The Supreme Executive Power*, provisionally appointed by the sovereign Mexican Congress, to all to whom these presents shall come, greeting: Know ye, that the sovereign Constituent Congress has decreed as follows:

The sovereign Constituent Mexican Congress has thought proper to enact the following *Constitutive Act of the Federation*.

*Form of government and Religion.*

ART. 1. The Mexican nation is composed of the provinces formerly known as the vice-royalty of New Spain, the captain-generalship of Yucatan, and the internal provinces of the east and west.

ART. 2. The Mexican nation is for ever free and independent of Spain, and of every other power, and it is not, nor can it ever become the patrimony of any family or person.

ART. 3. The sovereign power resides wholly and exclusively in the nation, which has consequently the exclusive power to adopt and to establish by means of its representatives, the form of government and other fundamental laws, which may appear to it best suited to its preservation and prosperity, and to change and to modify such laws, whenever it may think proper.

ART. 4. The religion of the Mexican nation is and shall perpetually remain the Roman Catholic and Apostolic. The nation protects it by just and wise laws, and prohibits the exercise of every other.

ART. 5. The nation adopts for the form of its government, a popular representative and federal republic.

ART. 6. Its integral parts are free, sovereign and independent states, in as far as regards exclusively its internal administration, according to the rules laid down in this act, and in the general constitution.

ART. 7. The states, at present comprising the federation, are the following; viz: Guanajuato; the internal state of the west composed of the provinces of Sonora and Sinaloa; the internal state of the east comprising the provinces of New Leon, Coahuila and Texas; the internal state of the north containing the provinces of Chihuahua, Durango and New Mexico; Mexico; Michoacan; Oajaca; Puebla de los Angeles; Queretaro; San Luis Potosi; New Santander, called also Tamaulipas; Tabasco; Tlascala; Vera Cruz; Jalisco; Yucatan and Zacatecas. The Californias and the district of Colima, (except the town of Tonila, which remains annexed to Jalisco) will for the present be territories of the Federation and directly subject to its supreme power. The districts and towns composing the province of the Isthmus of Guasacualco will return to those to whom they formerly belonged. The Lagune of Terminos appertains to the state of Yucatan.

ART. 8. The constitution may increase the number of states mentioned in the preceding article, and modify them as it may deem most conducive to the happiness of the people.

*Division of Powers.*

ART. 9. The supreme power of the Federation is divided into the legislative, executive, and judicial, and two or more of these powers can never be united in one person or corporation, nor can the legislative power be entrusted to a single individual.

*The Legislative Power.*

ART. 10. The legislative power of the Federation resides in a Chamber of Deputies and a senate, to be formed by the general congress.

ART. 11. The members of the Chamber of Deputies, and of the Senate shall be named by the states in the manner prescribed by the constitution.

ART. 12. The population shall be the basis of appointment of representatives to the Chamber of Deputies. Each state shall name two senators in the manner prescribed by the constitution.

ART. 13. The general congress shall have the exclusive right to enact laws and decrees;

1. To sustain the national independence, and to provide for the preservation and security of the nation in its external relations.

2. To preserve public peace and order in the interior of the Federation and to promote its improvement and general prosperity.

3. To maintain the independence of the states among themselves.

4. To protect and to regulate the liberty of the press throughout the Federation.

5. To preserve the federal union of the states, definitely to adjust their limits, and terminate their differences.

6. To sustain the relative equality of obligations and rights which the states are entitled to according to law.

7. To admit new states and territories into the federal union, by incorporating them with the nation.

8. To fix annually the expenses of the nation, after examining the statements, which for that purpose will be presented to it by the executive power.

9. To establish the contributions necessary to defray the general expenses of the republic, to determine their investment, and to require an account of their disbursement from the executive power.

10. To regulate commerce with foreign nations, and among the different states of the Federation and the Indian tribes.

11. To incur debts on behalf of the republic, and to give securities for their payment.

12. To acknowledge the public debt of the nation, and to indicate the means of consolidating the same.

13. To declare war after considering the facts which may be presented to its consideration by the executive power.

14. To grant letters of marque, and to declare lawful or otherwise the captures by land and sea.

15. To designate and to organise the sea and land forces, fixing the quota of each state.

16. To organise, arm and discipline the militia of the states, reserving to each the appointment of its respective officers, and the faculty of instructing them in conformity with the discipline prescribed by the general congress.

17. To approve all treaties of peace, alliance, amity, federation, armed neutrality, and every other which may have been entered into by the executive power.

18. To regulate and make uniform the weight, value, form, fineness and denomination of the money in all the states of the Federation, and to adopt a general system of weights and measures.

19. To grant, or to refuse the entry of foreign troops into the territory of the Federation.

20. To authorise the formation of ports and harbors.

ART. 14. The constitution shall fix the other general, special and economical attributes of the congress of the Federation, the mode of exercising them, as well as the prerogatives of this body and its members.

### *Executive Power.*

ART. 15. The supreme executive power will be confided to such individual, or individuals as the constitution may designate, who must be residents and native born citizens of some one of the states or territories of the Federation.

ART. 16. The attributes of the executive power, in addition to others which may be fixed by the constitution, shall be the following:

1. To carry into execution the laws intended to consolidate the integrity of the Federation, and to sustain its exterior independence, and its internal union and liberty.

2. To appoint and to remove at pleasure the Secretaries of State, &c.

3. To watch over the collection and to decree the distribution of the general contributions, according to existing laws.

4. To appoint the officers of the general treasury according to the constitution and existing laws.

5. To declare war, having first obtained a decree sanctioning the same from the general congress if in session, and if that be not the case, according to the mode pointed out in the constitution.

6. To dispose of the permanent army and navy and of the active militia for the external defence, and the internal security of the Federation.

7. To dispose of the local militia for the same objects, even though it should be necessary to employ the same beyond the limits of its respective states, after previously obtaining the consent of the general congress, which shall designate the force necessary.

8. To appoint the officers of the army, of the active and the armed militia with reference to existing laws and ordinances, and the dispositions of the constitution.

9. To grant discharges and licenses, and to regulate the pay of the military officers mentioned in the preceding article in conformity to law.

10. To appoint the diplomatic agents and consuls, with the appro-



bation of the senate, and until that body shall have been organised, with the approbation of the actual congress.

11. To direct diplomatic negotiations, make treaties of peace, friendship, alliance, federation, truce, armed neutrality, commerce and others; but in order to grant or refuse the ratification of any such treaty, it must obtain the previous approbation of the general congress.

12. To watch over the prompt and complete administration of justice by the general tribunals, and that their sentences be executed according to law.

13. To cause to be published, circulated and observed, the laws and the general constitution; possessing the right of opposing once the passage of a law, provided it be done within ten days, and to suspend its execution until the resolves of congress be known.

14. To issue decrees and orders for the better carrying into effect the constitution and the general laws.

15. To suspend from their employments for the space of three months or less, and to deprive of a portion of their salaries not to exceed one half, for the same period of time, all the officers of the Federation, infringing such orders or decrees, and in cases where it shall be deemed necessary, have them tried, in which event all the proceedings must be transferred to the competent tribunal.

ART. 17. All the decrees and orders of the supreme executive power ought to be signed by the secretary of that department to which they belong, and without this formality they are not to be obeyed.

### *Judicial Power.*

ART. 18. Every person inhabiting the territory of the Federation, has the right to require the prompt, complete, and impartial administration of justice; and with this object the Federation confides the administration of justice to a supreme court of justice, and to such tribunals as may be established in the separate states, reserving to itself the right to determine in the constitution the powers of the supreme court.

ART. 19. No person can be judged in the states and territories of the Union, except by laws in force, and by tribunals established prior to the act for which he is tried. Consequently all judgments by special commissions and all retroactive laws are forever prohibited.

### *Individual Government of the States.*

ART. 20. The government of each state shall be divided as to the exercise of its powers into a legislative, executive and judicial department; and two or more of these powers can never be entrusted to the same person or corporation, nor can the legislative power be confided to a single individual.

ART. 21. The legislative power of each state shall be entrusted to

a congress composed of such \*a number of individuals as may be determined by the constitution of each particular state, elected by the people, and removable at such time and in such manner as they may determine.

### *Executive Power.*

ART. 22. The exercise of the executive power of each state shall only be exercised for a determinate period to be fixed by the respective constitutions of each state.

### *Judicial Power.*

ART. 23. The judicial power of each state shall be exercised by such tribunals as may be established by its constitution.

### *General Provisions.*

ART. 24. The constitutions of the different states cannot be in opposition to the act, nor to the provisions of the general constitution, and on this account they cannot be sanctioned until the publication of the latter.

ART. 25. Nevertheless the legislatures of the different states may provisionally organise an internal government, and in the mean time they must see that the laws actually in force be observed.

ART. 26. The criminal of one state shall not receive asylum in another; but on the contrary must be immediately delivered over to the authorities requiring his delivery.

ART. 27. No state shall impose, without the consent of the general congress, any tonnage duty, nor maintain troops or vessels of war in time of peace.

ART. 28. No state shall, without the consent of the general congress, impose any tax or duty upon importations and exportations, during the period that this subject is not properly regulated by law.

ART. 29. No state shall enter into any transactions or contracts with another state, nor with any foreign power, nor engage in war, except in the event of actual invasion, or of such imminent danger that it does not admit of delay.

ART. 30. It is the duty of the nation to protect by wise and just laws the rights of man and of the citizens.

ART. 31. Every inhabitant of the Union has the liberty of writing, printing, and publishing his political ideas, without any necessity for previous license, revision or approbation, under the restrictions and responsibilities imposed by law.

ART. 32. The congress of each state must transmit annually to the general congress of the Union a circumstantial and correct account of the receipts and expenses of all the treasuries, which may exist in their respective districts, with an account of the causes of both, and of the different branches of industry, agriculture, commerce, and

bation of the senate, and until that body shall have been organised, with the approbation of the actual congress.

11. To direct diplomatic negotiations, make treaties of peace, friendship, alliance, federation, truce, armed neutrality, commerce and others; but in order to grant or refuse the ratification of any such treaty, it must obtain the previous approbation of the general congress.

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ART. 32. The congress of each state must transmit annually to the general congress of the Union a circumstantial and correct account of the receipts and expenses of all the treasuries, which may exist in their respective districts, with an account of the causes of both, and of the different branches of industry, agriculture, commerce, and

manufactures, indicating their progress, or decline together with the causes to which it can be attributed; the new modes of industry, which may be introduced and the means of fostering them; also their respective population.

ART. 33. All the debts, contracted before the adoption of this act, shall be acknowledged by the Federation; reserving to the general congress the right of establishing the rules, which must govern its liquidation and classification.

ART. 34. The general constitution and this act guarantee to the states of the Union the form of government adopted by this law, and each state assumes likewise the obligation of sustaining the Federal Union at every sacrifice.

ART. 35. This act can only be changed within the time and in the manner expressed in the general constitution.

ART. 36. The execution of this act is confided to the executive power, which is strictly responsible to carry the same into effect, and from the time of its publication it shall be observed in every respect.

Mexico the 31st of January, 1824.

Here follow the signatures of the deputies.

In consequence we command that all tribunals, justices, chiefs, and other authorities, civil, military, and ecclesiastical, of whatever class or dignity, observe, and cause to be observed, accomplish and execute the present decree in all its parts, and cause it to be understood, that it may be carried into effect, and see that it be printed, published, and circulated.

Given in Mexico the 31st of January, 1824.

José Mariano Michilena, President; Miguel Domingo, Vincente Guerrero.

To the minister of foreign and internal affairs.

By order of their highnesses this is made known to you that you may understand it, and see that it be executed.

God and Liberty, Mexico, the 31st of January, 1824.

JUAN GUZMAN.

THE FEDERAL CONSTITUTION OF THE UNITED MEXICAN STATES,  
SANCTIONED BY THE GENERAL CONSTITUENT CONGRESS ON THE  
4TH OF OCTOBER, 1824.

*The General Constituent Congress to the Inhabitants of the  
Federation.*

MEXICANS:—The General Constituent Congress in putting into your hands the most arduous work which you could have entrusted to its care, the fundamental Code, which fixes the fate of the nation, and serves as an indestructible basis of the great edifice of your society, has thought it their duty to address you, in order to explain briefly the objects they had in view from the first moments of their union; the labors it has undertaken, and what it expects from your

docility and submission when you begin to enjoy the gifts consequent on the federal system decreed and sanctioned by the majority of your deputies.

Congress will not employ itself in describing the series of events which have occurred in a revolution, which has lasted fourteen years, nor the great sacrifices which became necessary before the nation were able to secure the inestimable blessing of national independence. This is a task which the history of the present times will one day accomplish. At present it is only necessary to remark, that the constant assaults of patriotism having broken the chain which united us to Spain, there could remain no other centre of union, no other connecting link between the different provinces of this great nation, but the leader who had induced all the towns to pronounce their independence. An impartial world will judge of the events which induced him to place himself at the head of a second revolution, and of his tragical end; but the fact is certain, that the State was dissolved by the fall of this unfortunate man, and that nothing could restrain the revolution of the provinces; none possessed superiority over the other; and the ship of state would have been wrecked by the pitiless storm, if the wisdom and prudence, with which the people hastened to convoke the former Congress, had not given the nation a new existence. Congress could not fail to attend to the wishes of a nation which had just given so striking a proof of its intelligence, and the deputies could not vote against the wishes of their constituents. Never have the legislators of any nation had a clearer manifestation of public opinion to direct their deliberations, and never will the representatives of any people find themselves in a more favorable situation of knowing the desires of those from whom they received their mandate; and your deputies will retire to the bosom of their families, with the pleasing satisfaction of having labored in the spirit, and agreeably to the necessities of their constituents.

To create a firm and free government, without its being dangerous to the people; to place the Mexican nation in the rank which it ought to hold among civilised nations, and enable it to exercise the influence to which it is entitled by its situation, its population, and its wealth; to make all equal before the law; to create peace without disorder; peace without oppression; justice without rigor; clemency without weakness; to mark the limits of the supreme authorities of the nation; to combine them in such a manner that their union shall always be productive of good, and render evil impossible; to regulate the march of the legislature, sheltering it at the same time from precipitation and error; to arm the executive power with sufficient power and dignity to make it respected in the interior, and deserving every consideration from foreigners; to secure to the judiciary such an independence, that it will never create fears in the breast of the innocent, and still less afford the hope of impunity to the guilty; all this is in effect difficult, and here you perceive, Mexicans, the sublime

objects to which your General Congress has aspired in the Constitution, which it presents you. It has, however, not the presumption to think, that it has completely satisfied all your expectations; but it flatters itself, that you will view with indulgence the numerous errors which the weakness of its abilities may have stamped upon it, in consideration of the zeal of the virtuous, of wise patriots engaged in framing it, in the very short space of eleven months allowed them.

Your representatives, in meeting in the hall of their sessions, take with them the wishes of the people, expressed with unanimity and energy. The voice of the Federal Republic has made itself heard from every corner of the republic; and the public desire for this form of government has explained itself so generally, and with as much force as it explained itself in favor of independence. Your deputies therefore entertained no doubt on this subject, as to the desires of the nation. Nevertheless circumspection, which ought to guide all legislators, required that they should enter upon the examination, not only of the form of government, but likewise of the general existence of a desire to create one. You know, Mexicans, the discussions which have taken place on this subject, as well as their results. Your representatives cannot accuse themselves of having hurried on the march of events, nor of having given an impulse to the revolution. On the contrary, the nation being dissolved and disorganised, as well as exposed to be the sport of passions and parties, the General Congress, smoothing the difficulties, and sacrificing even their own reputation, lends its aid to arrest the genius of discord and disorder, restores peace and tranquillity, and pursues calmly its deliberations.

The division of the States, the installation of its respective legislatures, and the construction of a multitude of establishments, which have arisen in the short period of eleven months, furnish evidence that Congress has fulfilled in a great degree the hopes of the people, without pretending on this account to attribute to itself all the glory of such prosperous principles, and still less the original invention of the institutions which it has dictated. It had, fortunately, to do with a people obedient to the voice of duty, and a model to imitate in the flourishing republic of our neighbors to the North. It knew, fortunately, that the Mexican nation only intended to shake off passive obedience, and to enter on the discussion of their duties, interests, and obligations. It was fortunately penetrated with the desires and necessities of its constituents, and endeavored to fix their destinies, by giving to the public spirit a direction, conformable to an opinion formed by circumstances truly extraordinary, which had involved in a most disastrous revolution another people beyond the limits of Mexico.

The Federal Republic has been, and was the necessary fruit of these discussions. The systematic tyranny of the Spanish mandarins could alone induce them to govern so immense a territory by

the same laws, considering the enormous differences of its climates, dispositions of its inhabitants, and their consequent influence. What relations of convenience or uniformity could possibly exist between the burning soil of Vera Cruz and the frozen mountains of New Mexico? How could the same institutions govern the inhabitants of California and Sonora and those of Yucatan and Tamaulipas? The innocence and candor of the interior populations, have no occasion for laws relative to crimes and intrigues which are entirely unknown to them. The inhabitants of Tamaulipas and Coahuilas will reduce their code to a hundred articles, while the inhabitants of Mexico and Jalisco will be on a level with the great nations which have advanced in the career of social order. These are the advantages of the federal system: It gives each people the right of selecting for itself laws, analogous to its customs, locality, and other circumstances; to dedicate itself without impediment to the creation and improvement of those branches of industry which it may deem best calculated to promote its prosperity; to give to its labors all the impulse of which they are susceptible, without the difficulties created by the colonial system, or any other which, being at enormous distances, would lose sight of the interests of those it governed; to provide for its necessities in proportion to its progress; to place at the head of its administration, individuals attached to the country, and possessing at the same time sufficient knowledge to discharge their duties efficiently; to create the tribunals necessary for the prompt punishment of offences, the protection of property, and the security of its inhabitants; to terminate its domestic affairs without going beyond the limits of the state; in one word, to enjoy the rights of freemen.

The general congress was penetrated with the difficulties which the nation must conquer, in order to plant a system which, to say the truth, is complicated. It knows that it is an arduous undertaking, to obtain from intelligence and patriotism that, which can only be the effect of time and experience. But besides the consideration, that the soil of America is not contaminated with the vices of old Europe, we have before us the examples of modern nations, which have formed themselves, and enriched us with their knowledge. We have profited by the lessons which the world has received, since the happy invention of social science has loosened the cements of tyranny; and we ourselves have passed over, in the space of fourteen years the long period of three centuries. With such joyful presages, what ought not the Mexican nation to expect from its general congress?

Ancient legislators, in promulgating their laws, accompanied them with august preparations and ceremonies, calculated to produce that respect and veneration, which ought always to be their safeguard. An age of light and philosophy has dispersed these auxiliary prestiges of truth and justice; and these laws are now presented to the people, in order to undergo examination and discussion. Your representatives,



employing this plain and natural language, place this day in your hands the code of your fundamental laws, the result of their deliberations, cemented in the soundest principles which hitherto have been acknowledged as the basis of social happiness in civilised countries. It was, fortunately, not required to compromise with those colosses, who in their fall disfigured the revolutions of other countries. If in our annals, we meet with an ambitious son of the country, his history will teach, by its example to our descendants, the danger which attends the attempt of appropriating exclusively to yourself advantages reserved to the entire body of society.

Your representatives therefore hope, from the heroic patriotism and pure virtues of the Mexicans, that, next to their national independence, they will sustain, at every sacrifice, the republican government to the exclusion of royalty in every shape. An implied and eternally obligatory contract unites all the nations of independent America, not to admit into its bosom any other form of government, the tendency of which to propagate itself is irresistible and dangerous. The institutions of the new world present a new and unknown order; like itself in the history of the great events which change the ordinary march of things; and as the fall of the Cæsars confirmed in Europe the monarchical government, after the bloody and dangerous political revolutions which had preceded it, so, on the continent of Columbus, the democratical must necessarily finally prevail, after being revived with improvements on the ancient republics, owing to the vivifying inspirations of modern genius.

The time elapsed since the beginning of our revolution, has been usefully employed in collecting suitable arms, to drive back to the shades, whence they proceeded, all gothic governments, and to look for the constitutive bases of human associations in the immortal works of those sublime genii, who knew how to discover the lost rights of mankind. The moment has arrived to apply these principles, and to open the eyes of the Mexicans to the torrent of light which they send forth. They have declared, that neither force, prejudices, nor superstition shall be the regulators of their government. They have declared, with a philosophical writer, that, after having verified with Newton the secrets of nature, defined with Rousseau and Montesquieu the principles of society, and fixed their basis, extended with Columbus the superficies of the known globe, arrested with Franklin the lightning of the clouds, and given it direction, and given, with other creating geniuses, an indestructible life and unlimited extension to the productions of man. Finally, that after having united by a thousand ties, of commerce and social relations, they can no longer tolerate any other government than that which is analogous to such an order, created by so great and so precious acquisitions. The elevation of character which the American people has acquired, does not permit them again to bend their knees before despotism and prejudice, always fatal to the welfare of nations.

But in the midst of this progress of civilisation, our country requires

of us great sacrifices and a religious respect for morality. Your representatives inform you, that if you wish to place yourself on a level with the happy republic of our neighbors to the North, it is necessary, that you should elevate yourself to the lofty height of civic and moral virtues, which characterise that singular people. This is the sole basis of true liberty, and the best guarantee of your rights, and of the permanency of your Constitution. The faithful observance of promises, the love of labor, the education of youth, respect for your fellow men, these, Mexicans, are the sources whence your own happiness and that of your descendants must emanate. Without these virtues, without due obedience to law and authority, without a profound respect for our admirable religion, we will in vain possess a code of liberal maxims; in vain boast of good laws, and in vain proclaim a sacred liberty.

The General Congress also expects from the patriotism and activity of the authorities and corporations of the Federation, as well as from the individuals of the States, that they will use their best endeavors to establish and to consolidate our new-born institutions. But if instead of confining themselves to the sphere of their attributes, they endeavor to go beyond it; if instead of setting an example, by a just observance of the constitution and general laws, they endeavor to elude their accomplishment by interpretations and subterfuges, the offspring of our scholastic education; in such an event we already renounce the right of being free, and succumb easily to the caprice of a tyrant national or foreign, who will introduce among us the peace of the sepulchre and the calm of a prison.

To you, therefore, legislators of the states, it belongs to develop the system of our fundamental law, the corner stone of which is the exercise of public and private virtue. The wisdom of your laws will shine forth in their justice and utility; and their accomplishment will be the result of a severe vigilance on the manners. Inculcate, therefore, on your constituents the eternal rules of morality and public order; teach them religion without fanaticism, the love of liberty without exaltation; the most inviolable respect for the rights of others, which is the foundation of human associations. Marats and Robespierres have elevated themselves among their fellow citizens by proclaiming these principles, and these monsters have stained with tears and blood, the most illustrious nation on the earth, while they, imbued with crimes, rose by degrees to dignities whence they insulted the credulity of their fellow citizens. Washington proclaimed the same maxims, and this immortal man made the happiness of the States of the North. How are we to distinguish the first from the second; but by examining their manners, observing their progress, and remembering that without justice there can be no liberty, and that the bases of justice are founded on a just equilibrium between the rights of others and our own. This is the result of the problem of moral science.

Sheltered by this ægis, Mexicans, you have nothing to fear from your enemies. It is of no importance that our obstinate oppressors,

dare even yet in speaking of us to employ the degrading word of colonists, while the Mexican name is already inscribed among cultivated nations, among those of other sovereign powers. It is of no importaince that proud Spain, at present impotent, and an object of compassion to the rest of Europe, makes her feeble voice heard in the cabinets of foreign monarchs; all her pretensions will vanish before the consolidation of our institutions, and the strength the of arms of the sons of the country consecrated to the defence of their native land.

Let us, therefore, show the world, that only tyranny and the influence of despotic governments could retain us in the sad degradation in which we were confined for so many years, and that at the moment of shaking off this dominion, nothing can prevent us from returning to the great family of mankind, from which we appeared to be severed. Europe and the rest of America have their eyes fixed upon us, and our national honor is strongly engaged in our future conduct.

If we deviate from the path of the Constitution, if we do not regard it as one of our most sacred duties, to maintain order, and scrupulously to observe the laws contained in our new code; if we do not unite to save this deposit, and to shelter ourselves from the attacks of the malevolent; Mexicans, we will be disgraced for the future, without having been formerly happy, and we shall bequeath to our children, misery, war and slavery, while to ourselves there will remain no other resource than to choose between the sword of Cato, and the unfortunate fates of a Hidalgo, a Mina or a Morelos.

Mexico, the 4th of October, 1824.

Lorenzo de Zavala, President; Manuel de Viya y Cosio Deputy Secretary; Epigmenio de la Piedra, Deputy Secretary.

*Department of the first Secretary of State.*—Section of the Government—The Supreme Executive Power has thought proper to direct to me the following decree:

The supreme executive power, appointed provisionally by the sovereign, general and constitutive congress of the United Mexican States, to all to whom these presents may come, greeting; be it known, that the same sovereign congress has been pleased to decree as follows:

The sovereign, general and constitutive congress of the United Mexican States has thought proper to decree:

'That the government shall proceed solemnly to publish without loss of time, the constitution in this capital, and shall immediately communicate the same to the governors of the states and political authorities in order to enable them to do the same in all the towns within their limits.

The supreme executive power shall regard it as understood, and take the necessary measures to carry it into effect, causing it to be printed published and circulated.

Lorenza de Zavala, President; Manuel de Viya y Cosio, Deputy Secretary; Epigmenio de la Piedra, Deputy Secretary.

In consequence we enjoin on all tribunals, justices, commanders,

governors and other authorities as well civil as military and ecclesiastical, of whatever class and dignity, that they observe and cause to be observed, accomplished and executed the present decree in all its parts. You will therefore hold it understood for its execution and take suitable dispositions to have it printed, published and circulated.

In the National Palace of Mexico, 4th October, 1824.

Guadalupe Victoria, President; Nicholas Bravo Miguel Dominguez, A. D. Juan Guzman.

Which is made known to you for your information and its accomplishment.—May God preserve you many years.

Mexico, 4th October, 1824.

JUAN GUZMAN.

*The Supreme Executive Power* appointed provisionally by the sovereign congress of the nation, to all to whom these presents shall come greeting; Know ye, that the said sovereign congress has decreed and sanctioned the following

#### FEDERAL CONSTITUTION OF THE UNITED MEXICAN STATES.

In the name of Almighty God, supreme author and legislator of society. The general constituent congress of the Mexican nation in discharge of the duties imposed upon it by its constituents in order to fix their political independence, to establish and consolidate their liberty and to promote their prosperity and glory decree as follows:

#### 1. CONSTITUTION OF THE UNITED MEXICAN STATES.

#### TITLE I.

#### *Only Section.*

#### *Of the Mexican Nation, its Territory and Religion.*

ART. 1. The Mexican nation is for ever free and independent of the Spanish government and of every other power.

ART. 2. Its territory comprehends the former vice-royalty of New Spain, the captain-generalship of Yucatan, the former commandancies of the internal provinces of the east and west and Upper and Lower California with the lands annexed and the adjacent islands in both oceans. A constitutional law will be made for designating the boundaries of the Federation as soon as circumstances will permit.

ART. 3. The religion of the Mexican nation shall perpetually remain the Roman Catholic and Apostolic. The nation protects it by wise and just laws and prohibits the exercise of every other.

## TITLE II.

*Only Section.*

*Of the form of Government of the Nation, of its integral parts, and of the division of the Supreme Power.*

ART. 4. The Mexican nation adopts for the form of its government a popular representative and federal republic.

ART. 5. The constituent parts of the Federation are the following States and Territories, viz: the States of Chiapas, Chihuahua, Coahuila and Texas, Durango, Guanajuato, Mexico, Michoacan, Nuevo Leon, Oajaca, Pueblo de los Angeles, Queretaro, San Luis Potosi, Sonora and Sinaloa, Tabasco, Tamaulipas, Vera Cruz, Jalisco, Yucatan, and Zacatecas; the Territories of Upper California, Lower California, Colima, and Santa Fe de Nuevo Mexico. A constitutional law will fix the character of Tlascala.

ART. 6. The Supreme power of the Federation as to its exercise, is divided into the legislative, executive and judicial powers.

## TITLE III.

## OF THE LEGISLATIVE POWER.

*Section First.*

*Of its Nature, the Mode of exercising it.*

ART. 7. The legislative power of the nation is confided to a General Congress, which is divided into two chambers, one for the Deputies, and the other for the Senators.

*Section Second.*

*Of the Chamber of Deputies.*

ART. 8. The Chamber of Deputies shall be composed of representatives, the whole of which shall be elected every two years by the citizens of the States.

ART. 9. The qualifications of the electors shall be constitutionally prescribed by the legislatures of the states, to which it also belongs to regulate the elections conformably to the principles established by this constitution.

ART. 10. The general basis for the appointment of deputies shall be the population.

ART. 11. A deputy shall be elected for every eighty-thousand inhabitants and for every fraction exceeding forty thousand. Any state,

which may not have so large a population is nevertheless entitled to one deputy.

**ART. 12.** A census of the whole confederation shall be taken within five years, and shall be renewed afterwards every ten years, which shall serve to designate the number of deputies to which each state is entitled. In the meantime the elections are to be regulated on the basis established in the preceding article, and the census which served to regulate the election of deputies in the congress now in session.

**ART. 13.** There shall also be elected in every state deputies substitute in proportion of one for every three deputies or one for every fraction of two. States having less than three deputies will elect one substitute.

**ART. 14.** Every territory containing more than forty thousand inhabitants, shall name one deputy and one substitute, who shall have voice and vote in the formation of all laws and decrees.

**ART. 15.** A territory not possessing the aforesaid population, shall name a deputy and a substitute, who shall have the right to speak on all subjects. The election of the deputies from the different territories shall be regulated by a special law.

**ART. 16.** In all the states and territories of the Federation, the appointment of the deputies shall take place the first Sunday in the month of October next preceding the re-election, which is an indirect election.

**ART. 17.** As soon as the election of deputies is concluded, the electoral boards shall, through their president, forward to the council of the government evidence, in due form, of the act of election, and duly certified, and they shall notify to the persons appointed their election, which shall serve as their credentials.

**ART. 18.** The president of the council of the government shall give to this evidence, spoken of in the preceding article, that direction which is prescribed by the regulations of said council.

**ART. 19.** In order to be appointed deputy it is necessary:

1st. To have, at the time of election, full twenty-five years.

2d. To have resided in the state from which elected full two years, or to be born in it, though residing in a different state.

**ART. 20.** Those not born in the territory of the Mexican nation, must, in order to be elected deputies, have resided at least eight years within the same, and possess real estate in some part of the republic worth eight thousand dollars, or some species of industry making them an income of one thousand dollars annually.

**ART. 21.** Are excepted from the operation of the preceding article:

1st. All those born in any part of America, which, in 1810, depended on Spain, and which has not united with any other nation, and which no longer remains dependent on Spain, for whom three years residence will suffice, provided they have the other requisites prescribed by the 19th article.

2d. All military men not born in the territory of the Republic, but who have supported with arms the independence of the country, for

whom it shall be sufficient to have resided eight years in the country, and to possess the qualifications required by article 19.

ART. 22. The election of deputies on account of residence shall be preferred to that made on account of birth.

ART. 23. The following cannot be deputies, viz:

1st. Those deprived of, or suspended from, the rights of citizens.

2d. The president and vice president of the Union.

3d. The members of the supreme court of justice.

4th. The secretaries of the different departments, their officers and secretaries.

5th. The officers of the treasury, whose employments extend throughout the Union.

6th. The governors of the states and territories, the commandant generals, the right reverend archbishops and bishops, the governors of the archbishops and bishops, the provisor and vicar generals, the circuit judges, and the commissary generals of war and finance for the states and territories in which they exercise their functions.

ART. 24. In order that the persons comprehended in the preceding article may be elected deputies, it is necessary that their functions should have entirely ceased six months previous to the elections.

### *Section Third.*

#### *Of the Chamber of the Senators.*

ART. 25. The senate shall be composed of two senators from each state, elected by an absolute majority of the legislatures of each state, one half of their number to be renewed every two years.

ART. 26. The senators elected in the second place shall cease to hold their places at the end of the two first years, and afterwards the most ancient.

ART. 27. When there occurs a vacancy in the senate on account of death, resignation, or other cause, such vacancy shall be filled by the legislature of the respective state, if such legislature be in session, and if not, as soon as it may be in session.

ART. 28. In order to be senator the same qualities are required, which are prescribed in the preceding section for deputy, and moreover to be thirty years at the time of the election.

ART. 29. Those who cannot be deputies cannot be senators.

ART. 30. Article 22 shall likewise govern the election of senators.

ART. 31. When the same individual is elected senator and deputy, he shall prefer the election prior in point of time.

ART. 32. The periodical election of senators shall take place in all the states on the same day, which shall be the 1st of September next, to the renewal of one-half of the senate.

ART. 33. When the election of the senators, the different legislatures shall forward a certificate of the same, through their presidents to the council of the government, in the usual form of acts of election,

and make known to the persons elected their appointment by another instrument which shall serve as a credential of their election. The president of the council of the government shall dispose of these certificates of election in the manner prescribed in the 18th article.

*Section Fourth.*

*Of the Economical Functions of the two Chambers and of the Prerogatives of their Members.*

ART. 34. Each chamber in its preparatory boards, and in all which has reference to its interior government, will observe the regulations which shall be formed by the present congress, without prejudice to such reforms, which may in future be introduced, if both chambers shall deem it proper.

ART. 35. Each chamber is judge of the elections of its respective members, and shall resolve all doubts which may arise relative to the same.

ART. 36. The chambers cannot open their sessions without the concurrence of more than the half of all the members elected; but the members present of both chambers ought to unite on the day indicated by the regulation for the interior government of both, and compel respectively their absent members to attend under the penalties prescribed by law.

ART. 37. The chambers shall communicate with each other and with the executive power by means of their secretaries, or by means of deputations.

ART. 38. Each of the chambers in their capacity of grand jurors can take cognisance of the following offences, viz:

1. Of the President of the Union, for the crimes of treason against the national independence, or the established form of government, and for bribery and corruption committed during the period of his employment.

2. Of the same president; for acts manifestly intended to hinder the elections of presidents, senators and deputies, or to prevent them from serving in their respective employments during the periods pointed out by the constitution, or for preventing the chambers from exercising any of the powers conferred on them by the constitution.

3. Of the members of the supreme court of justice, and the secretaries of the departments; for any offences committed during the time of their holding their employments.

4. Of the governors of the states; for infractions of the constitution, the laws of the Union, or the orders of the President of the Federation, which are not obviously contrary to the constitution and the general laws of the Union, and also for the publication of the laws or decrees of the legislatures of their respective states contrary to the same constitution and laws.

ART. 39. The Chamber of Representatives shall be exclusive



grand jurors, when the President and his ministers shall be accused of acts in which the senate and the council of the government have intervened by virtue of their attributes. The same chamber shall also serve as grand jurors in all cases where the vice president shall be accused of any offence committed during the time of holding his office.

ART. 40. The Chamber before which may have been made the accusations spoken of in the preceding articles, shall form itself into a grand jury, and shall declare by the vote of two-thirds of its members present, if there be sufficient cause for having the accused tried, in which event he shall be suspended from office, and the cause sent to the competent tribunal.

ART. 41. Every deputy and senator has the right of presenting in writing propositions and projects of laws or decrees in his respective Chamber.

ART. 42. The deputies and senators are not responsible for any opinions which they may express in the discharge of their employments, and they can never be called to account for the same.

ART. 43. In criminal prosecutions brought against the senators or deputies from the day of their election, until two months after they shall have discharged their functions, the former cannot be accused except before the Chamber of Deputies, and the latter, except before the Senate, and in the event of similar accusations the Chamber shall form itself into a grand jury, for the purpose of determining if there be any foundation for such accusation.

ART. 44. If the Chamber, constituting the grand jury in the cases mentioned in the preceding article, should declare by the vote of two-thirds of the members present, that the accusation is well founded: the accused remains suspended from his employment, and placed at the disposal of the competent tribunal.

ART. 45. The compensation of the deputies and senators shall be determined by law, and be paid by the General Treasury of the Confederation.

ART. 46. Each Chamber as well as the boards spoken of in the 36 art., may issue such orders as it deems convenient, in order to carry into effect any resolutions adopted by virtue of the function, delegated to each by virtue of the 35, 36, 39, 40, 44 and 45th art., of the Constitution, and the President of the United States ought to cause them to be executed, without possessing the right of making any observations on their tenor.

### *Section Fifth.*

#### *Of the Powers of the General Congress.*

ART. 47. No resolution of the General Congress shall assume any other form than that of a law or a decree.

ART. 48. The resolutions of the General Congress, in order to have

the force of a law or decree ought to be signed by the President, except in those cases excepted by the Constitution.

ART. 49. The laws or decrees, which emanate from the General Congress, shall have for their object:

1. To sustain the national independence, and to provide for the preservation and security of the nation in its exterior relations.

2. To preserve the Federal Union of the States, and peace and public order in the interior of the Confederation.

3. To maintain the independence of the states among themselves, so far as respects their government according to the Constitutive act and this Constitution.

4. To sustain the proportional equality of obligations and rights which the states possess in point of law.

ART. 50. The exclusive powers possessed by the General Congress are the following, viz:

1. To promote instruction by securing for a limited time to authors the exclusive privilege to their works; by establishing colleges for the Marine, Artillery and Engineer Departments; by erecting one or more establishments, for the teaching of the natural and exact sciences, the political and moral sciences, the useful arts and languages; without prejudice to the rights which the states possess, to regulate the public education in their respective states.

2. To promote the general prosperity, by decreeing the opening of roads, canals, and their improvement without hindering the states from opening and improving their own; establishing post offices and post roads, and securing for a limited time to inventors, or those who have perfected, or introduced any new invention, the exclusive privilege for their respective inventions, improvements or new introductions.

3. To protect and to regulate the political liberty of the press in such a manner that its exercise can never be suspended, and much less be abolished in any of the states or territories of the confederation.

4. To admit new states and territories into the federal union, and to incorporate the same with the nation.

5. To regulate definitively the boundaries of the states, and terminate the differences, when they cannot agree among themselves about the lines of demarcation of their respective districts.

6. To erect territories into states and regulate them in conformity with those already existing.

7. To unite two or more states, upon their petition to that effect, into one, or to erect new states within the limits of those already in existence, with the approbation of three fourths of the members present in both chambers, and the ratification of an equal number of the legislatures of the other states of the Union.

8. To fix the general expenses, establish the contributions necessary in order to defray them, to regulate their collection, determine their expenditure, and to require annually account of the same from the government.

9. To contract debts on the credit of the confederation, and to fix the guarantees of their repayment.

10. To acknowledge the national debt, and indicate the means to consolidate and extinguish the same.

11. To regulate the commerce with foreign nations, between the different states of the Union and with the Indian tribes.

12. To give instructions for the forming of Concordates with the Holy See, to approve and ratify the same, and to regulate the right of patronage (*putronato*) in the whole Union.

13. To approve treaties of peace, alliance, friendship, confederation, armed neutrality, and all others which the President of the United States may enter into with foreign powers.

14. To establish ports of all kinds, erect custom-houses, and designate their location.

15. To determine and to render uniform the weight, fineness, value, stamp and denomination of the coins throughout the Union, and to adopt a general system of weights and measures.

16. To declare war, upon examining the facts presented to its consideration by the President of the United States.

17. To establish rules for the granting of letters of marque, and for declaring valid or invalid prizes on land and water.

18. To designate the force of the army and navy, to fix the contingent of men to be furnished by each state, to establish ordinances and rules for their organisation and service.

19. To form regulations for the organisation, arming and disciplining of the local militia of the states; reserving to each state the appointment of its own officers and the faculty of instructing them according to the discipline laid down in the aforesaid regulations.

20. To grant or to refuse the entrance of foreign troops into the territory of the confederation.

21. To permit or to refuse squadrons belonging to foreign powers to remain for more than one month in Mexican harbors.

22. To permit the departure of the national troops beyond the limits of the republic.

23. To create or suppress all public employments of the Federation, to fix, increase or diminish the appointed salaries, rewards, in case of retirement, and pensions of the same.

24. To grant rewards and compensations to persons who have rendered great services to the republic, and to decree public honors in memory of great men.

25. To grant amnesties and indulgences for offences the cognisance of which appertains to the tribunals of the confederation, in such cases, and upon observing the prerequisites prescribed by law.

26. To establish a uniform rule of naturalisation.

27. To establish general rules as to bankruptcy throughout the Union.

28. To select a place of residence for the supreme powers of the

Federation and to exercise in its district the attributes of the legislative power of a state.

29. To change such residence whenever it may deem it necessary.

30. To grant laws and decrees for the interior administration of the Territories.

31. To dictate all laws and decrees, which may conduce to accomplish the objects spoken of in the forty-ninth article without intermeddling with the interior administration of the states.

### *Section Sixth.*

#### *Of the Formation of the Laws.*

ART. 51. The formation of all laws and decrees may begin indistinctly in either of the chambers, except those having for their object the levying of contributions or of raising taxes, which must originate in the Chamber of Deputies.

ART. 52. The following shall be considered as initiatives of laws;

1. Propositions which the President of the United Mexican States shall deem advantageous to the Union and which as such he shall specially recommend to the Chamber of Deputies.

2. Propositions, projects of laws or decrees, which the legislatures of the states may address to either chamber.

ART. 53. All projects of laws or decrees without any exception whatever shall be successively discussed in the two chambers, observing in both with exactness what it prescribed in the regulations as to the form of debate, as well as to the delays and modes of proceeding in voting.

ART. 54. Propositions of laws or decrees, which have been rejected in the chamber, where they originated, before the final reading cannot again be proposed by any member during the sessions of that year, nor until the ordinary sessions of the year following.

ART. 55. If the propositions of laws or decrees after having been discussed be approved by an absolute majority of the members present in both chambers, they shall be sent to the president, who if he also approves shall sign and publish the same; and if not, shall return them with his observations within ten working days to the chamber whence they originated.

ART. 56. The propositions of laws or decrees returned by the president, according to the preceding article, shall be a second time discussed in the two chambers. If in each of them, they be approved by two-thirds of the members present, they shall again be sent to the president, who without further excuse must sign and publish them; but if not approved by the votes of two-thirds of the members, they cannot again be proposed until the year following.

ART. 57. If the president should not return a proposed law or decree within the period prescribed in the 55th art. it shall be considered as approved by that very fact, and be promulgated as law; unless while the

delay is not yet expired, congress should have closed or suspended its sessions, in which event the return must be made on the first day thereafter when congress shall again unite.

ART. 58. The projects of laws or decrees once wholly rejected by the chamber of revision, shall be returned by said chamber to that in which it originated. If upon re-examination in the latter, it be approved by two-thirds of the members present, it shall be sent back again to the chamber by which it was rejected, who shall not again reject it, unless by the vote of two-thirds of the members present.

ART. 59. All proposed laws or decrees, which, on a second examination, have been approved by two-thirds of the members of the chamber where they originated, and not disapproved by two-thirds of the chamber of revision, shall be sent to the president who must sign and circulate them, or send them back within ten working days to the chamber where they originated.

ART. 60. All propositions of laws or decrees which, according to the preceding article, the president may send back to the chamber where they originated, shall be again considered, and if they are approved by two-thirds of the members present, and the chamber of revision be not equally divided, they shall be returned to the president, who shall cause them to be published. But if in their origin they were approved by two-thirds of the chamber, or disapproved by an equal number of the chamber of revision, they cannot again be taken up except at a subsequent regular session.

ART. 61. In case they should be reprovved a second time by the chamber of revision, according to article 58, the proposition shall be considered as thrown out, and it cannot again be taken up until the following year.

ART. 62. In the amendments, which the chamber of revision may make to proposed laws or decrees, the same formalities must be observed as on other subjects requiring the approbation of the president.

ART. 63. The portions of a proposed law or decree, which may be once disapproved by the chamber of revision, are subject to the same formalities as those propositions which have been wholly disapproved.

ART. 64. In the interpretation, modification, and repeal of laws and decrees the same formalities must be observed which are required for their formation.

ART. 65. Whenever any resolution of the general congress is communicated to the President of the Republic, it must be signed by the presidents of both chambers, and by a secretary belonging to each.

ART. 66. No law or decree can be formed in either chamber without the presence of an absolute majority of the members composing it.

*Section Seventh.**Of the Time, Duration, and Place of holding the General Congress.*

ART. 67. The general congress shall meet every year on the 1st of January, in the place designated by law. The regulations for the interior government of the same, shall prescribe the formalities previous to the opening of the same, as well as those to be observed at its installation.

ART. 68. The President of the Confederation shall assist at this opening, and shall pronounce a discourse suitable to this important act; to which, the presiding officer of congress shall reply in general terms.

ART. 69. The ordinary sessions of congress shall be held daily, without any other interruption than solemn days of festivals; and in order to suspend its meetings for more than two days, the consent of both chambers is necessary.

ART. 70. The chambers shall reside in the same place; and they cannot remove to another, without previously agreeing on such removal, as well as the time and manner of effecting it, and designating the same point for their re-union. But if both agree on the removal, but differ as to time, mode, and place, the President of the Union shall decide the question, by choosing one of the places in dispute.

ART. 71. The general congress shall close its sessions annually on the 15th of April, with the same formalities prescribed for its opening, with the faculty of prolonging it for thirty working days whenever they deem it necessary, or the President of the Union may request it.

ART. 72. Whenever the general congress may unite in extra session, it shall be composed of the same deputies and senators which formed the ordinary session, and who will confine their attention exclusively to the objects for which they were convoked; but if these be not disposed of at the day appointed for the regular session, the extra session must be closed, and the points pending left to the decision of the ordinary congress.

ART. 73. The resolutions taken by congress relative to the change, prorogation, or suspension of its sessions, according to the three preceding articles, must be communicated to the president, who will cause them to be executed without making any observations thereon.

## TITLE IV.

## OF THE SUPREME EXECUTIVE POWER OF THE CONFEDERATION.

*Section First.**Of the Persons to whom this Power is confided, and their Election.*

ART. 74. The supreme executive power is entrusted to a single individual, who shall be styled President of the United Mexican States.

ART. 75. There shall also be a vice president, who shall discharge all the duties of the president, in case of physical or moral inability of the latter.

ART. 76. In order to be president or vice president it is necessary, to be born a Mexican citizen, to be thirty-five years of age at the time of the election, and residing in the country.

ART. 77. The president cannot be re-elected until the fourth year after his functions have ceased.

ART. 78. He, who has been elected president or vice president of the republic, will discharge these functions in preference to all others.

ART. 79. The 1st of September, of the year immediately preceding that on which the president ought to enter on his office, the legislature of each state must elect, by an absolute majority of votes, two individuals, of which one at least shall not be a resident of such state.

ART. 80. When the vote has been taken, the legislatures shall forward to the president of the council of government, evidence of the act of election in due form, in order that he may dispose of the same in the manner prescribed by the regulations of the council.

ART. 81. On the 6th of January following, the evidence, spoken of in the preceding section, shall be opened and read in joint session of the chambers, if two-thirds of the votes of the states have been received.

ART. 82. When this evidence has been read, the senators shall retire, and a committee, appointed by the chamber of deputies, and composed of one member from each state represented, shall give an account of the result.

ART. 83. The chamber shall forthwith proceed to examine the election, and enumerate the votes.

ART. 84. He who unites the absolute majority of the votes of the legislatures shall be president.

ART. 85. If two were to possess a majority, he shall be president who has the greatest number of votes, and the other vice president. In case of equality, the chamber of deputies shall elect one as president, and the other shall be vice president.

ART. 86. If neither have the absolute majority of votes of the legislatures, the chamber of deputies shall elect the president and vice president, choosing for each one having the greatest number of votes.

ART. 87. When more than two individuals possess a majority, or equal number of votes, the chamber shall choose among them the president or vice president, as the case may be.

ART. 88. If one have the absolute majority, and two or more an equality of votes, but greater than the rest, the chamber shall choose from those having the greatest votes.

ART. 89. If all have an equal number of votes, the chamber shall choose a president and vice president from among the whole; as also, when one has a greater number, and the rest an equal number of votes.

ART. 90. Should there be a tie, when voting upon the elections of the legislatures, the vote shall be repeated once, and if it still continues to be a tie, chance shall decide.

ART. 91. In competitions between two or more, having an equal number of votes, the voting must be directed to reduce the competitors to two or one, in order that the remaining party be placed in competition with him who has a majority of votes.

ART. 92. As a general rule, in voting for president and vice president, chance shall not be resorted to till after two votings.

ART. 93. In voting on the elections of the legislatures, as well as on the nomination of president and vice president, the representation of each state shall have but one vote; and in order to have a decision of the chamber, there must be an absolute majority of votes.

ART. 94. In order to deliberate on the objects mentioned in the preceding article, there must concur more than one-half of the whole number of members, and three-fourths of the deputies of the states.

### *Section Second.*

#### *Of the Duration of the Presidency and Vice Presidency, and the mode of filling Vacancies in each, and of their Oath.*

ART. 95. The President and Vice President of the Union shall enter on their functions on the 1st of April; and shall vacate their offices, on the same day four years afterwards, by a new and constitutional election.

ART. 96. If from any cause whatever, the elections of president and vice president should not be completed and published by the first of April on which the installation is to take place, or the persons elected should not be ready to enter on the office, the functions of the former shall, nevertheless, cease, and the chamber of deputies, voting by states, shall elect a president ad interim.

ART. 97. In case the president or vice president be temporarily prevented, what has been prescribed in the preceding article shall take place, and if the impediment were to occur while the congress is not in session, the supreme executive power is confided to the president of the supreme court of justice and two individuals chosen by the absolute plurality of votes of the council of the government. These



cannot be members of the general congress, and they ought to possess the qualifications required of the president of the Union.

ART. 98. While the elections above spoken of are making, the president of the supreme court of justice discharges the executive power.

ART. 99. In the event of perpetual impossibility of the president or vice president, congress, and in their recess the council of the government, shall provide for the case according to the 96th and 97th articles, and take steps that the legislatures proceed to elect a president and vice president according to the constitutional forms.

ART. 100. The election of president and vice president made by the legislatures, in consequence of the perpetual impossibility of those holding these offices, shall not prevent the ordinary elections which take place the first of September every four years.

ART. 101. The president and vice president elected every four years, ought to be on the first of April in the place where the supreme powers of the Union reside, and take an oath before the united chambers to fulfil their duties in the following form: I, —, appointed president (or vice president) of the United Mexican States, swear before God and his holy evangelists, that I will faithfully discharge the office which the United States have entrusted me with, and that I will observe, and cause to be observed, exactly the constitution and the general laws of the confederation.

ART. 102. If neither the president nor the vice president present themselves to take the preceding oath, and the session of congress is open, they shall take such oath before the council of government as soon as each presents himself.

ART. 103. If the vice president present himself, and take the oath before the president, he shall be at the head of government until the president has taken the oath of office.

ART. 104. The president and vice president, constitutionally appointed according to the 99th article, and the individuals provisionally appointed to exercise the functions of president according to the 96th and 97th articles, shall take the oath mentioned in the 101st article, before the chambers if in session, and if not, before the council of the government.

### *Section Third.*

#### *Of the Prerogatives of the President and Vice President.*

ART. 105. The president may propose to congress such new laws or reform in the old laws as he may think conducive to the general good, by proposing them to the chamber of deputies.

ART. 106. The president may once, within ten working days, make observations on laws and decrees passed by the general congress, and suspend their publication until the resolution of congress, except in cases provided for by the constitution.

ART. 107. The president, while he remains in office, can only be

accused before one of the chambers, and only for the offences mentioned in the 38th article, and committed at the time therein specified.

ART. 108. Within one year, counting from the time at which the office of the president ceases, he cannot be accused except before the chambers, for offences mentioned in the 38th article, as well as for all others committed during the time he was in office. When the year is passed, he cannot be accused for such offences.

ART. 109. The vice president, during the four years of his employment, can only be accused before the chamber of deputies for an offence committed during the time of such employment.

#### *Section Fourth.*

#### *Of the Attributes of the President, and the Restrictions of his Powers.*

ART. 110. The attributes of the president are the following:

1. To publish, circulate, and cause to be observed, the laws and decrees of the general congress.

2. To make regulations, decrees, and orders for the better observance of the constitution, constitutive act, and general laws.

3. To execute the laws and decrees having for their object the preservation of the integrity of the Union, and to sustain its exterior independence, and its interior union and liberty.

4. To appoint and remove at pleasure the secretaries of state.

5. To watch over the collection, and decree the appropriation of the general contributions agreeably to law.

6. To name the heads of the treasury, the general commissaries, diplomatic agents, consuls, colonels and other superior officers of the permanent army, and of the armed and active militia, with the approbation of the senate, and in the recess, by the council of the government.

7. To appoint the other officers of the permanent army and of the armed and active militia, and the officers of the confederation observing therein the dispositions of the law.

8. To appoint, out of three candidates proposed by the supreme court, the judges and fiscals of the circuit and district courts.

9. To grant discharges and furloughs, and regulate the pensions of the military, agreeably to law.

10. To dispose of the permanent army and navy and the active militia for the interior security and external defence of the nation.

11. To dispose of the local militia for the same objects, and even employ the same beyond the limits of their respective states and territories, after previous consent of the general congress, which shall specify the force necessary, and, if congress be not in session, the council of the government shall give its consent, and make the afore-said specification.

12. To declare war in the name of the United Mexican States,

upon a previous decree of the general congress; grant letters of marque according to the provisions of law.

13. To make concordats with the Apostolic See, according to the terms of the 12th power of the 50th article.

14. To direct diplomatic negotiations, and make treaties of peace, friendship, alliance, truce, confederation, armed neutrality, commerce, and all other kinds; but in order to give or withhold ratification of the same, the approbation of the general congress is necessary.

15. To receive ministers and other agents of foreign powers.

16. To ask of the general congress the prorogation of their sessions for thirty working days or less.

17. Convoke extra sessions of congress when he thinks it necessary, and two-thirds of the members present of the council of government shall agree to it.

18. Also to convoke extra sessions of congress, when two-thirds of the members present of the council of government think it necessary.

19. To see that prompt and perfect justice is administered by the supreme court and other tribunals of the Union, and that their decrees be carried into effect, according to law.

20. To suspend from their employments, for a space not exceeding three months, and deprive of not more than half their salaries for the same period, all persons employed by the Union, who violate his orders or decrees, and, if he thinks such persons should be tried, to send them before the competent tribunals.

21. To approve or retain decrees of councils, pontifical bulls, letters, and rescripts, with consent of the general congress, consulting the senate, and, in the recess, the council of government, when they treat on subjects peculiar to the administration, and the supreme court, when on subjects of litigation.

ART. 111. The president, in publishing the laws and decrees, shall use the following formula: "The President of the United Mexican States makes known to the inhabitants of the Republic, that the General Congress has decreed as follows: [here insert the text]." Wherefore, I order that the same be printed, published, and circulated and carried into effect.

ART. 112. The restrictions of the president's powers are the following:

1. The president cannot command in person the army or navy without the previous consent of the general congress, or, in its recess, the council of government, by a vote of two-thirds of the members present, and when he commands them with such permission, the vice president shall act as president.

2. The president cannot deprive any one of his liberty, nor impose any punishment; when the welfare and security of the Union requires, he may, however, arrest persons, placing them, within forty-eight hours, at the disposition of the competent tribunals.

3. The President cannot occupy the property of any individual

or corporation, nor disturb them in their possession or use of the same; and if in any case it should be necessary for some object of acknowledged utility to take the property of an individual or a corporation, it cannot be done without previous approbation of the senate, and in the recess, the council of the government, always indemnifying the party the value fixed by appraisers chosen by himself and the government.

4. The President cannot impede elections nor the other acts spoken of in the 38th article.

5. Neither the President nor the Vice President can leave the republic during the time of their office, nor for a year afterwards.

### *Section Fifth.*

#### *Of the Council of the Government.*

ART. 113. During the recess of Congress there shall be a Council of Government composed of half the senate, one from each state.

ART. 114. For the first two years the council shall be composed of those first elected by their respective legislatures, and in the sequel by the oldest.

ART. 115. The Vice President shall be president of the council, and he shall appoint according to his own regulation a president pro tempore to discharge his functions in his absence.

ART. 116. The attributes of this council shall be as follows:

1. To watch over the observance of the constitution and the constitutive act and general laws, keeping a record of all incidents relating to this subject.

2. To make such observations to the President as they deem useful to the accomplishment of the constitution and laws of the Union.

3. To require, of their own accord, or at the request of the President, extra sessions of Congress, but in such cases two thirds of the members present must concur, according to §§ 17. and 18. of art. 110.

4. Give their consent for using the local militia, according to § 9. of art. 110.

5. Approve of the appointments mentioned § 6. of art. 110.

6. Give its consent in the case of art. 112. § 1.

7. Appoint two individuals, who jointly with the president of the supreme court, shall exercise provisionally the supreme executive power, according to art. 97.

8. To receive the oath of art. 101, from the individuals of the supreme executive power, in the cases mentioned in the constitution.

9. To give their opinion in consultations with the President, according to § 21, art. 110. and on other subjects on which he may consult them.

*Section Sixth.**Of the Business of Government.*

ART. 117. For the despatch of the business of government of the republic, there shall be appointed such a number of secretaries as Congress may establish by general law.

ART. 118. All the regulations, decrees and orders of the President ought to be signed by the secretary of state of the department to which it belongs, and without this formality they are not to be obeyed.

ART. 119. The secretaries of state shall be responsible for all acts of the President, signed by them contrary to the constitution, the constitutive act, general laws, and the constitutions of particular states.

ART. 120. The secretaries of state shall give to each chamber, as soon as it opens, an account of the situation of their respective departments.

ART. 121. In order to be secretary of state, one must be born a Mexican citizen.

ART. 122. The secretaries of state shall form regulations for the distribution and despatch of business under their care, which shall be submitted by government to Congress for their approbation.

## TITLE V.

## OF THE JUDICIAL POWER OF THE UNION.

*Section First.**Of the Nature and Distribution of this Power.*

ART. 123. The judicial power of the Union shall reside in a supreme court of justice, and in circuit and district courts.

*Section Second.**Of the Supreme Court of Justice, the Election, Duration and Oaths of its Members.*

ART. 124. The supreme court of Justice shall be composed of eleven ministers, divided into three chambers, and of one fiscal, the general Congress having power to increase this number if they think proper.

ART. 125. In order to be elected member of the supreme court, it is necessary to be instructed in the science of the law, in the opinion of the legislatures of the states, to have thirty-five years of age, be a natural born citizen of the republic, or born in some part of America, which prior to 1810 belonged to Spain, and which has separated from it, provided he have five years residence within the republic.

ART. 126. The individuals composing the supreme court of justice shall hold the office for life, unless removed according to law.

**ART. 127.** The election of the members of the supreme court shall take place on the same day, by the legislatures of the state by an absolute majority.

**ART. 128.** The elections concluded, each legislature shall send to the president of the council of the government a certified list of the twelve individuals elected, noticing him who has been appointed Fiscal.

**ART. 129.** The president of the council as soon as he shall have received the lists of at least three-fourths of the legislatures, shall dispose of them in the manner prescribed by the regulations of the council.

**ART. 130.** On the day appointed for the meeting of Congress, the said list shall be opened and read, in the presence of both chambers, after which the senators shall retire.

**ART. 131.** Immediately the chamber of deputies shall appoint by an absolute majority a committee, which must be composed of one deputy from each state, whose representatives are present, to which the lists must be sent, in order to verify the result, after which the chamber will verify the election and count the votes.

**ART. 132.** The individual or individuals uniting more than one half of the votes given by all the legislatures, and not by those of their respective members, shall be regarded as elected, and the chamber will so declare them.

**ART. 133.** If those uniting a majority of the suffrages spoken of in the preceding article do not amount to twelve, the same chamber shall elect successively among the individuals who have obtained the greatest number of votes of the legislatures, observing in relation to such election, what has been prescribed in the first section of tit. 4th, which treats of the election of President and Vice-President.

**ART. 134.** If a senator or deputy be elected minister or fiscal of the supreme court, he will prefer such election.

**ART. 135.** When a vacancy occurs in the supreme court, it shall be filled agreeably to the provisions of this section, information having been previously given to the governors and legislatures of the states.

**ART. 136.** The members of the supreme court, before entering into office, shall take the following oath before the president of the republic; "Ye swear by God our Lord to conduct yourselves faithfully and legally in the discharge of the duties confided to you by the nation, and if ye act thus God will reward you, if not, punish you."

### *Section Third.*

#### *Of the Attributes of the Supreme Court.*

**ART. 137.** The following are the attributes of the supreme court:

1. To take cognisance of disputes, which may arise between the different states of the Union, whenever there arises litigation in relation to the same, requiring a formal decree, and that arising between a state and one or more of its inhabitants, or between individuals in

relation to lands, under concessions from different states, without prejudice to the right of the parties to claim the concession from the party which granted it.

2. To decide disputes which grow out of contracts and transactions between the supreme government and its agents.

3. To consult upon the acceptance or refusal of papal bulls, letters and rescripts, granted on litigated points.

4. Decide on the competency of the tribunals of the Union, and on conflicting jurisdictions between them and the state tribunals.

5. To take cognisance,

*First.* Of accusations against the president and vice-president according to arts. 38 and 39, after the previous declaration of art. 49.

*Secondly.* Of criminal prosecutions of the deputies and senators indicated in art. 43, after the declaration spoken of in art. 44.

*Thirdly.* Of those against the governors of the states in the cases mentioned in art. 38. part 3d, after the declaration spoken of in art. 40.

*Fourthly.* Of those against the secretaries of state agreeably to art. 38 and 40.

*Fifthly.* Of the civil and criminal affairs of the diplomatic agents and consuls of the republic.

*Sixthly.* Of causes in admiralty, prizes by land and water, and contraband; of crimes committed on the high seas; of offences against the united Mexican nation; of the officers of the treasury and justice of the Union; of infractions against the constitution and general laws, according to the dispositions of law.

ART. 138. It shall be determined by law, in what manner the supreme court shall take cognisance of the cause mentioned in this section.

#### *Section Fourth.*

##### *Mode of judging the Members of the Supreme Court.*

ART. 139. To judge the members of the supreme court, the chamber of deputies shall elect every two years, in the first month of their ordinary session, and voting by states, twenty-four individuals, not members of congress, and possessing the qualifications of the members of the supreme court. From these shall be chosen by lot a fiscal, and a number of judges equal to the first chamber of the court, and when it is necessary, the chamber of deputies, and, in the recess, the council of government, shall elect in the same manner the other chambers (*salas*).

#### *Section Fifth.*

##### *Of the Circuit Courts.*

ART. 140. The circuit court of a judge skilled in law and a fiscal, both named by the supreme executive power from three candidates,

designated by the supreme court, and of two associates, according to law.

ART. 141. To be circuit judge, it requires to be a citizen, and thirty years of age.

ART. 142. To these courts belong, to judge causes in admiralty; captures by land and sea, contraband; crimes committed on the high seas; offences against the United States of Mexico; suits against consuls, and civil causes in which the Union is interested exceeding five hundred dollars in value. A special law shall designate the number of these courts, the manner and form in which they ought to exercise their powers: they are under the inspection of the supreme court.

### *Section Sixth.*

#### *Of the District Judges.*

ART. 143. The United Mexican States shall be divided into a certain number of districts, in each of which there shall be a judge skilled in law (*letrado*), and who shall take cognisance, without appeal, of all causes in which the Union is interested, and whose value does not exceed five hundred dollars, and in the first instance of all causes which belong to the jurisdiction of the circuit courts.

ART. 144. To be judge of the district court, it is necessary to be a citizen of the Union, and twenty-five years of age. The president appoints these judges from three candidates named by the supreme court.

### *Section Seventh.*

#### *General Rules for Administration of Justice in the States and Territories of the Union.*

ART. 145. Each state shall give faith and credit to the acts, registers, and proceedings of the judges and other authorities of the other states, and congress shall establish a uniform law for proving such acts, registers, &c.

ART. 146. The penalty of infamy does not extend beyond the person punished.

ART. 147. The confiscation of goods is forever abolished.

ART. 148. All judgments by commission and retroactive laws, are forever prohibited.

ART. 149. No authority shall ever inflict the torture under any pretence.

ART. 150. No one can be confined unless there be half proof or indications of his guilt.

ART. 151. No one shall be detained on indications alone, for more than sixty hours.

ART. 152. No authority can direct the seizure and registry of papers



and effects in houses, except in cases and in the form expressly prescribed by law.

ART. 153. No one is bound to accuse himself in criminal matters.

ART. 154. The military and ecclesiastic remain subject to the same laws and tribunals as heretofore.

ART. 155. No suit can be instituted, either for civil or criminal injury, without previous demand in conciliation.

ART. 156. No one can be deprived of the right of terminating his differences before arbitrators chosen by each party, in every stage of the cause.

## TITLE VI.

### OF THE STATES OF THE FEDERATION.

#### *Section First.*

##### *Of the Particular Government of the States.*

ART. 157. The government of each state shall be divided into three powers, viz: the legislative, executive, and judicial, and two or more of these can never be united in the same person or corporation, nor can the legislative power be vested in a single individual.

ART. 158. The legislative power of each state resides in a legislature, composed of the number of individuals determined by their particular constitutions, elected by the people, and removable at the time and in the manner they may prescribe.

ART. 159. The person or persons to whom the states confide the executive power can exercise it only for a limited time, fixed by their constitutions.

ART. 160. The judicial power in each state shall be exercised by the tribunals established by their constitutions, and all causes as well civil as criminal which originate in such courts must be therein finally disposed of.

#### *Section Second.*

##### *Of the Obligations of the States.*

ART. 161. Each state is bound;

1. To organise its government agreeably to the constitution and the constitutive act.

2. To publish through their governors, their constitutions and laws.

3. To cause the constitution and general laws of the Union to be observed, as well as all treaties made or to be made with foreign powers.

4. To protect its inhabitants in the enjoyment of the liberty of writing, printing and publishing their political ideas, without license, or

previous revision or approbation, causing however the laws relative to this matter to be duly observed.

5. To surrender criminals to the governments of other states, claiming them.

6. To surrender fugitives from other states to the persons justly claiming them or compel them in some other mode to satisfy the party interested.

7. To contribute to the extinguishment of the debts acknowledged by congress.

8. To send annually to each of the chambers of congress a circumstantial account of the receipts and expenditures of the treasuries in their respective districts, with the origin of each, the state of agriculture, commerce and manufactures, of the new modes of industry which might be usefully introduced and protected, as well as the population and the means of protecting and augmenting the same.

9. To forward to the chambers, and in the recess to the council of government, and the executive power, a copy of their constitutions and laws.

### *Section Third.*

#### *The Restrictions of the Powers of the States.*

ART. 162. No state can,

1. Establish tonnage duties nor ports of entry without consent of congress.

2. Impose duties on imports and exports without consent of congress.

3. Have a standing army or navy without the consent of congress.

4. Engage in transactions or declare war with foreign powers, resisting them however in case of actual invasion, of which immediate notice is given to congress.

5. Enter upon any transaction with other states of the Union, without consent of congress, or its subsequent approval if it has reference to boundaries.

## TITLE VII.

### *Only Section.*

#### *Of the Observance, Interpretation, and Reform of the Constitution and Constitutive Act.*

ART. 163. All public functionaries without exception, before entering on their offices must take an oath to observe the constitution and the constitutive act.

ART 164. Congress will enact laws to punish those violating the constitution.

ART. 165. Congress alone has the right to interpret the constitution in doubtful cases.

ART. 166. The legislatures of the states may make observations on the different provisions of the constitution and constitutive act, but congress shall take them into consideration till the year 1830.

ART. 167. The congress of the present year will select such observations as deserve to be referred to the next congress, which must be communicated to the president who will cause them to be published without any observations.

ART. 168. Next congress in the first year of its ordinary session, shall take into consideration these observations, and make such reforms as it thinks necessary. But the same congress cannot propose amendments and act on them.

ART. 169. The reforms and additions which may be proposed after 1830, shall be considered by congress in the 2d year of their session, and if regarded as necessary according to the preceding articles, this resolution shall be published for the consideration of the next congress.

ART. 170. To reform or add to this constitution or the constitutive act, all the rules shall also be observed, which are required for the formation of laws except that the president shall not have the right to make the observations of art. 106.

ART. 171. Those articles of this constitution and of the constitutive act which establish the liberty and independence of the Mexican nation, its religion, form of government, liberty of the press and the division of the supreme powers of the Union and of the states can never be changed.

Given in Mexico on the 4th of October in the year of our Lord 1824, in the 4th year of the Independence, 3d of Liberty and 2d of the confederation.

(Signed)

LORENZO DE ZAVALA, President, &c.

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## TITLE XI.

DECREES AND ORDERS OF THE CORTES OF SPAIN, CONSIDERED AS BEING IN FORCE IN THE REPUBLIC OF THE UNITED STATES OF MEXICO.

*Decree of the 12th March, 1811.*

*Various Measures for the Encouragement of Agriculture and Industry in America.*

ONE of the principal cares, which occupies the attention of the general and extraordinary Cortes, being to furnish the inhabitants of the extensive provinces in America all the means necessary to promote and secure their real happiness, and being persuaded of the justice and utility of those proposed by the council of the regency upon the representations made by the Right Rev. Bishop of Valladolid de

Michoacan, of the 30th May, 1810, with the interesting object of encouraging, in those countries, the advancement and improvement of agriculture and industry, and to diminish, as far as practicable, the impediments and obstructions which at present retard their progress to the great injury of the state; they therefore decree:

1. That the tax upon stores known by the name of *pulperias* be abolished. 2. That it is permitted freely to make and to sell spirits of mezcal (*aguardiente mezcal*) in the viceroyalty of Mexico. 3. That six dollars in specie are to be paid on each barrel of said mezcal spirits, and that a reduction of two specie dollars be allowed on the tax imposed on each barrel of rum. 4. That the increase of two reals lately imposed on each pound of tobacco remains in force, as well as that of two per cent. over and above the six per cent. collected as excise duty, as well as the application of these duties to the payment of principal and interest of the loan of twenty millions of dollars opened in New Spain. 5. That in order to fill up this loan the more rapidly, it is permitted, out of the common funds belonging to the Indians, to invest so much in this loan at interest as the communities have the control of and may be willing voluntarily to contribute in the different towns, villages, and communities of that kingdom. 6. That the viceroy of New Spain, after consulting the fiscals and a (*junta*) board composed of the archbishop, regent, intendant, the contador mayor, the contador of tributes, a royal officer, the senior regidor, the procurator syndic, and a good man elected by the (*ayuntamiento*) common council of Mexico, will examine and reduce to its just value the duty to be in future paid on *pulque*, and cause the same to be carried into effect, rendering however account to his Majesty, through the council of the regency, for his sovereign sanction.

*Decree of the 13th March, 1811.*

*Indians and Castes exempted from Tribute: Distribution of Lands to the former, prohibition to the Justices to traffic in such Lands.*

The general and extraordinary Cortes having carefully examined the decree published by the former council of the regency, in the royal island of Leon, of the 20th of May of the year 1810 last past, and the proclamation for its execution ordered to be published in Mexico by the viceroy of New Spain, Don Francisco Xavier Venegas, of the 5th October of the same year; and at the same time that they have thought proper to approve the exemption from tribute, granted in the aforesaid decree, to the Indians, with the extension declared by the aforesaid viceroy in the above mentioned proclamation in favor of the *castes* of mulattoes, negroes and others, who have remained, and do remain faithful to the sacred cause of the country in the district of that viceroyalty; decree:

1. That the aforesaid favor of exemption from tribute shall be extended to the Indians and other castes in the other provinces of

America. 2d. That the favor of the distribution of lands in the villages of the Indians does not extend to the castes. 3. That the greatest rigor be observed in executing the royal orders and dispositions which prohibit the justices from continuing the abuse of trading within their respective jurisdictions under the specious pretext of distributions.

*Decree of the 22d of April, 1811.*

*Of the free Incorporation of Lawyers in their Colleges.*

The general and extraordinary Cortes, after the most careful examination and deliberation, decree: That the colleges of lawyers shall subsist without limiting the number of individuals composing them, and that the admission and incorporation into them shall be free to all lawyers who may desire it, for which purpose the Cortes abrogate all general or particular laws, orders or dispositions promulgated for the purpose of fixing and reducing the number of lawyers in each and every college of the nation.

*Decree of the 22d of April, 1811.*

*Abolition of the Torture, and Compulsions, and Prohibition of other Painful Practices.*

The general and extraordinary Cortes with absolute unanimity, and in conformity to the wishes of all, decree:

That the torture is forever abolished throughout the dominions of the Spanish monarchy, as well as the practice introduced of molesting and afflicting criminals with what are illegally and abusively called coercions (*apremios*); and also handcuffs, shackles and extraordinary calabosos, and all other unusual punishments, whatever may be their character and use, and no judge, tribunal or jurisdiction, whatever may be its privileges, can cause the torture to be inflicted, nor use the before enumerated oppressive punishments, without incurring the responsibility and punishment of removal from office of the judges who may order such infliction, immediately to be carried into effect; and this offence may be prosecuted before every tribunal, for which purpose all ordinances, laws, orders and dispositions, contrary hereto, are abrogated.

*Decree of the 14th of July, 1811.*

It being necessary that absolute subordination should be established among all classes of the monarchy, this being the only means of giving a uniform movement and direction to the machine of state, to direct to one end the efforts of all, the general and extraordinary Cortes therefore decree:

1. Every general, junta, audiencia and every other superior whose duty it is to execute the orders of the government, shall be responsible

for the execution of the same, and be deprived of their respective employments, if by culpable omission, negligence or neglect, of immediately inflicting punishment for disobedience, they have caused such orders to be neglected.

2. The justices or inferior authorities, whose more immediate duty it is to execute the law or order, will incur the same penalty as if they had disobeyed the same, if they omit to employ all the means allowed by law to carry the same into effect.

3. The Council of the Regency will watch zealously over the execution of the laws, ordinances and decrees, requiring a strict responsibility from the authorities charged with their execution, and punishing them irremissibly in case of neglect, and the Cortes require, that on no account, shall the Council of the Regency repeat the orders once given, without previously inflicting the merited punishment on all and every person who has rendered himself in any manner culpable of retarding its accomplishment.

*Decree of the 6th of August, 1811.*

*Incorporation of the Seigniorial Jurisdictions of the Nation, Abolition of Privileges: that no one can call himself the lord of vassals or exercise jurisdiction as such.*

The general and extraordinary Cortes, desirous of removing the obstacles which may impede a good administration, and the augmentation of the population and prosperity of the Spanish monarchy, decree as follows:

1. That from the present moment all seigniorial jurisdictions, of whatever class or condition, remain incorporated with the nation.

2. That justices and other public functionaries shall immediately be appointed therein in the same manner as is practised in the royal towns.

3. The corregidores, alcaldes, mayors, and other functionaries, comprehended in the preceding article, shall cease to exist from the publication of this decree, except, however, the common councils (*ayuntamientos*), and ordinary alcaldes, who shall remain in office unto the end of the year.

4. The titles of vassal and vassalage are abolished, and also the grants, as well real as personal, which have taken their origin from this title of jurisdiction, except those proceeding from voluntary contracts in the free exercise of the sacred use of property.

5. The territorial and feudal seignories remain from the present moment in the same class as the other rights of individual property, if they be not of the nature of those who are incorporated with the national property, or those in which the conditions, on which they were granted, have been complied with, as it results from the title by which they were acquired.

6. In the same manner all contracts, agreements and conventions

which may have been made, in consideration of advantages, rents or annuities of land or others of this kind, entered into between the so called lords, and their vassals ought in future to be considered as contracts made between private individuals.

7. All so called privative, prohibitive and exclusive privileges, which owe their origin to seigneurial rights, such as the chase, fishing, furnaces, mills, water privileges, as well as those of the forest, and others remain free to the towns; to be used in conformity to the common law, and the municipal regulations established in each town, without however depriving the lords of the use which as individuals, they may be entitled to make of furnaces, mills and other rural property of this kind, nor of water privileges, pastures and other property held in common, to which in the same capacity they may be entitled by the right of vicinage.

8. Those who have obtained the aforesaid privileges by an onerous title, shall have the capital which it appears, according to the title of acquisition, that they have paid, restored to them; and those who possess them as rewards for great and acknowledged services, shall be indemnified in some other manner.

9. Those who think themselves entitled to the right of indemnity, spoken of in the preceding article, will present the titles by which they acquired their property to the chanceries, and audiences of the territories wherein said property is situated, in which, for the future, actions of this nature ought to be brought, examined and terminated in the two tribunals of view and review, and with the preference which their importance demands, saving and excepting such cases, which may be entitled to the extraordinary proceedings provided by law; the declarations of this decree being in all respects subordinate to the laws, which by their tenor are not expressly abrogated.

10. As to the indemnity which ought to be granted to the possessors of the aforesaid exclusive privileges, in order to reward them for their great and acknowledged services, it must be preceded by a justification of this quality, before the competent territorial tribunal, which will consult with the government, after having forwarded the original record of its proceedings, which will indicate what is to be done after consulting with the Cortes on the subject.

11. The nation will advance the capital proved to have been disbursed by the title of acquisition, or will acknowledge the same as due and furnish the requisite obligation for its payment, allowing in all cases three per centum interest, on the same from the publication of this decree, to the redemption of the aforesaid capital.

12. In whatever time the possessors may present their titles, they shall be heard, and the nation remains responsible for the discharge of the obligations, spoken of in the preceding article.

13. No demand or contestation will be admitted, which shall impede the punctual accomplishment, and prompt execution of all that has been ordered in the preceding articles, and all suits now pending must be stayed, so as to carry into immediate effect what is herein

ordered, according to the literal tenor of this decree, which furnishes the rule which ought to govern in future decisions, and if any doubts should arise as to its meaning and true sense, the tribunals must abstain from the interpretation and solution of the same, and they must consult his majesty through the medium of the Council of the Regency, after having forwarded the original record of the proceedings in the cause.

14. In future no one shall be entitled to call himself lord of vassals, or to exercise jurisdiction, appoint judges, nor to use the privileges and rights comprehended in this decree, and he who shall do so notwithstanding what is above prescribed, shall lose all right of indemnity in the cases already indicated.

*Decree of the 11th November, 1811.*

*Of the Responsibility as to the Observance of the Decrees of the National Congress.*

The general and extraordinary Cortes, desirous of rendering effective the responsibility of all persons having public employments, with reference, and in conformity to what is provided in the decree of the 14th July last, and to the end to secure by this means, the punctual observance of its sovereign resolutions, decrees that every public officer, civil or military, who on the third day after the reception of a law, or decree of the national congress, shall delay to execute the same in so far as it respects him, shall remain by such act deprived of his office, and the Council of the Regency is required to proceed immediately to appoint another person in his place, without prejudice to the right of proceeding afterwards, in the premises in conformity to law. Judges and magistrates who shall offend against the foregoing provision, become subject to the application of the 2d article, third chapter of the provisional regulations for the Council of the Regency, which considers them suspended, for just cause, from their respective employments, and shall forthwith order suit to be instituted against them, according to the dispositions of the foregoing article, of the aforesaid regulation. The secretaries of state will attend to the punctual execution of this decree, under the penalty of being removed from their offices, in case of neglect.

*Decree of the 18th January, 1812.*

*Of Employments which cannot be filled by Substitutes.*

The general and extraordinary Cortes, desirous of putting an end to the injuries which result to the public administration of the affairs of the state, by the abuse which has introduced itself, of employing substitutes in the discharge of certain offices which ought to be fulfilled by the owners thereof, decree:



1. That no employment or office, requiring the personal attendance of the person employed therein, can be supplied by substitute.

2. The public officer appointed to a different office than that which he holds, and which requires his personal attendance incompatible with the proper discharge of the duties of that which he held previously, will elect, in the space of eight days, between the two employments, and choose which of them he will resign, observing in it what has been prescribed by the Cortes.

3. If the officer be appointed temporarily to fill some public employment, he may appoint a substitute to discharge the functions of his office for the time that such temporary employment continues.

4. The same may be done when, on account of sickness or some just cause of absence, the public officer is unable to discharge the duties of his office for some short time.

*Decree of the 23d of May, 1812.*

*Formation of the Constitutional Ayuntamientos.*

The general and extraordinary Cortes, convinced that it is equally important to the welfare and tranquillity of families, and the prosperity of the nation, that common councils (ayuntamientos) be established as soon as practicable in such towns where it is proper that they should be instituted, and which have not hitherto enjoyed the benefit thereof, as well as to avoid the doubts, which might arise in the execution of what has been prescribed on this subject in the constitution, and to establish a uniform rule for the appointment, form of election, and the number of its members, decree as follows:

1. Every town which has no common council, and the population of which does not amount to one thousand souls, and which, on account of the peculiar condition of its agriculture, industry, or population requires a common council, will make the same known to the deputation of the province, in order that by virtue of this information they may apply to the government for the requisite permission.

2. Towns which find themselves in this situation, shall be united to the councils to which they have hitherto belonged, as long as the improvement of their political condition shall not require other measures, uniting those newly formed to those nearest them in their province, or to those which have lost their jurisdiction for want of population.

3. By virtue of the provision of the 312th article of the constitution, the functions of the regidores and other perpetual officers of the common councils, cease as soon as the constitution and this decree shall have been received in each town, and they shall be elected according to an absolute plurality of votes as prescribed in the 313th

and 314th articles of the constitution, as well in those towns where all have the quality of being perpetual, as in those where some only enjoy this privilege; for the information of those towns wherein the election may be carried into effect four months before the expiration of the year, it is ordered that said election be renewed at the end of the month of December of the same year, as to one half, those to go out who were last elected; but in those towns wherein the elections take place when less than four months are required to terminate the year, those elected will continue in their employment until the end of the next year, when one half of them will cease to hold their offices.

4. As it cannot fail to be proper that there should exist between the government of the towns and its inhabitants, such proportion as is compatible with good order and its better administration, there shall be one *alcalde*, two *regidores*, and one *procurator syndic* in all towns which do not have more than two hundred inhabitants; one *alcalde*, four *regidores* and one *procurator* in those, the population of which exceeds two hundred but does not exceed five hundred inhabitants; one *alcalde*, six *regidores*, and one *procurator* in those which possess five hundred, but the population of which does not amount to one thousand inhabitants. Two *alcaldes*, eight *regidores*, and two *procurator syndics* in towns having from one thousand to four thousand inhabitants, and the number of *regidores* will be augmented to twelve in those towns which have more than four thousand inhabitants.

5. In the capitals of the provinces there must be at least twelve *regidores*, and should they possess more than ten thousand inhabitants, their number will be sixteen.

6. In following out these principles in making the elections to fill these offices, it is ordered that the election take place on some day of festival in the month of December, by the inhabitants who are in the exercise of the rights of citizenship, of nine electors, in the towns which have less than one thousand inhabitants, of sixteen in those having more than one thousand and less than five thousand inhabitants, and of twenty-five electors in those towns having a greater number of inhabitants.

7. This election being completed, there shall be formed on another day of festival in the month of December, the board of electors presided by the political chief, if there be any, and if not, by the oldest of the *alcaldes*, and in the absence of the *alcalde* by the oldest *regidor*, in order to deliberate on the persons most suitable for the government of the town, and they cannot adjourn without having completed the election, which must be transcribed in a book kept for this purpose, and signed by the president and the secretary, who shall be likewise secretary of the council, and said election shall be immediately published.

8. In order to facilitate the appointment of the electors, especially where the population is numerous, or where the divisions or distances of the towns or parishes, which must unite in order to form their council, might create difficulties or delays; boards are to be formed in

each parish composed of all the inhabitants domiciliated therein, which must be previously convoked, and must be presided by the political chief, alcalde or regidor, and each one of them must elect the number of electors to which it is entitled, in the proportion which its population bears to the total population, and the act of the election must be transcribed in a book kept for this purpose, and be signed by the president and the secretary, which the board may appoint.

9. A parish board cannot be held in towns not having fifty inhabitants, and those being in this predicament must unite among themselves, or with such as are nearest; but all such towns as have hitherto enjoyed the privilege of nominating electors for the appointment of justices, councils or deputies in common, shall retain this privilege.

10. If, notwithstanding what has been provided in the preceding article, there should still be a greater number of parishes than there are electors, still an elector is to be nominated by each parish.

11. If the number of parishes should be less than the number of electors, each parish will elect one, two, or more, until it has completed the requisite number; but if an elector were yet wanting, he must be appointed by the parish having the largest population; and if another be still wanting, he must be elected by the parish having the next largest population, and so successively.

12. Inasmuch as it may happen, that there exist in the ultramarine provinces some towns, which, owing to peculiar circumstances, ought to have common councils for their better government, but whose inhabitants are not in the enjoyment of the rights of citizens, they have nevertheless the right to elect, among themselves, the officers of their councils, in conformity to the rules herein prescribed for other towns.

13. The common councils will not in future have any permanent assessors, with fixed salaries.

### *Decree of the 10th July, 1812.*

#### *Rules for the Formation of Constitutional Ayuntamientos.*

The general and extraordinary Cortes, desirous of avoiding, in all the towns of the monarchy, the doubts which have been referred to them by the governor of the island of Leon, in relation to their decree of the 23d of May last past, as well as all other doubts which might arise in the construction of said law, decree:

1. That, in order to carry into effect the formation of the councils in the mode and manner prescribed by the 3d article of the decree of the 23d of May last, the functions shall cease to exist from this moment, not only of the perpetual regidores, but of all the individuals actually composing the said bodies or institutions, reserving to them the faculty of election to charges in the new councils.

2. In order to be eligible to the office of secretary of the ayuntamiento, it is not necessary to be notary public.

3. The boards of health shall continue to discharge the same functions, which they have hitherto fulfilled, until the regency of the kingdom, after examining the powers granted by the constitution to the common councils, shall adopt and reduce to order, through the ministry of the government, a plan, which ought to govern in this particular, and said plan has been adopted by the Cortes.

*Decree of the 9th October, 1812.*

*Chapter Third.*

*Of the Constitutional Alcaldes in the Towns.*

ART. 1. Inasmuch as the alcaldes of towns exercise in them the office of amicable compounders, every person who wishes to attack another before the district judge, either on account of some civil wrong, or some tort, must present himself before the competent alcalde, who, with two good men (*hombres buenos*) appointed, one by each of the contending parties, shall hear both parties, and take into consideration the reasons they allege, and, after hearing the opinions of the two associates, shall give, within eight days at most, his conciliating decision, calculated, in his opinion, to terminate the litigation without going any farther. This decision will, in effect, terminate the dispute, if the parties acquiesce in the decision, which must be inscribed upon a book, which the alcalde must keep, bearing the title of *Decisions of Conciliation*, signed by the said alcalde, the good men, and the parties, if they know how to write, and certificates of the same are to be given to such as may desire the same.

ART. 2. If the parties do not conform to this decree, it must also be inscribed in the same book, and the alcalde shall give a certificate to the party requiring it, that he has brought an action of conciliation, and that the parties interested have not assented thereto.

ART. 3. When some person, residing in another town, is cited before the competent alcalde of conciliation, the alcalde must cause him to be cited, by means of the judge of his residence, that he may appear, either personally, or by attorney with competent powers, within a sufficient period of time, which must be prescribed; and if he should not appear, the plaintiff will be entitled to a certificate, specifying, that he has made a demand in conciliation, which has failed, because the defendant has neglected to appear.

ART. 4. If the demand in conciliation has reference to the effects of a debtor about to remove the same; or to prevent the construction of some new work, or other things of like urgency, and the plaintiff requires the alcalde to take provisional measures in order to avoid the injury which might arise from delay: the alcalde shall do so immediately, and forthwith proceed with the conciliation.

ART. 5. The *alcaldes* will moreover take cognisance in their respective towns of all civil suits wherein the sums in controversy do not exceed fifty *reals vellon* in the Peninsula and the adjacent islands, and one hundred silver dollars in the ultramarine provinces; and in criminal cases of slight faults and injuries which only require reprimand or light correction, the proceedings in both cases being verbal. For this purpose, the *alcaldes*, as well in civil as in criminal matters, will associate good men, as before mentioned, chosen by each of the contending parties, and after hearing the plaintiff and defendant, and taking the opinion of the associates, shall give such a decision before the notary as they may deem just, and from such an opinion the parties cannot appeal, nor does it require any other formality than to inscribe it, together with a succinct exposition of the proceedings, in the book which is required to be kept for verbal judgments and to have it subscribed by the *alcalde* the good men and the notary.

ART. 6. The *alcaldes* of towns shall likewise take cognisance of all judicial proceedings in civil suits until litigation arise among the parties thereto, in which event, they shall transfer them to the district judge.

ART. 7. They may all take cognisance, at the request of the parties, of such proceedings as are litigated, when they are very urgent, as the preparation of an inventory, the quieting of possession, or others of a like nature, referring the matter to the judge, as soon as the object of their intervention has been accomplished.

ART. 8. The *alcaldes*, when a crime has been committed in their towns, or some delinquent has been discovered, ought to proceed *ex officio* or at the request of a party, to institute the first proceedings of the inquest (*sumaria*) and cause the criminals to be apprehended, in every cause where an offence has been committed which according to law deserves corporal punishment, or when the offender has been found *flagrante delicto*; but in such cases, they shall immediately transfer to the district judge the proceedings by them had; and place the criminals at his disposal.

ART. 9. The *alcaldes* of towns in which the district judge resides may, and ought to make all the preparatory proceedings spoken of in the preceding article, and give immediate notice of the same to the district judge, that he may continue the proceedings.

ART. 10. In all the proceedings which may be required as well in civil as in criminal causes the district judges cannot employ other *alcaldes* than those of their respective towns.

ART. 11. As it respects the government, economy and the police of the towns, the *alcaldes* shall exercise the same jurisdiction and powers, which existing laws grant to the ordinary *alcaldes*, observing in every respect the provisions of the constitution on this subject.

## BOOK V.

### TITLE I.

#### LAWS AND DECREES OF THE STATES OF COAHUILA AND TEXAS.

##### DECREE No. 1.

The Constituent Congress of the State of Coahuila and Texas has thought proper to decree as follows:

1st. Said Congress is solemnly and legally installed in conformity to the decrees relative to its institution, and qualified to exercise its functions agreeably to the constitutive act of the Mexican Confederation, and other federal laws, that have been, or may be hereafter enacted by the general congress.

2d. The state of Coahuila and Texas is an integral part of the federation, equal to the other states of which the same is composed, and is free, sovereign and independent in whatever exclusively relates to the internal administration and government thereof, agreeably to the constitutive act, and to the constitution of the United Mexican States, which shall be promulgated by the general congress.

3d. The territory of the state shall be that recognised as both provinces until the present time.

4th. The state of Coahuila and Texas solemnly pledges itself to obey and to sustain at all hazards the supreme federal powers, and its own federal union with the rest of the states, and the constitutional independence of all and each one of the same.

5th. The deputies shall be inviolable as regards their opinions, and at no time, in no case, and by no authority shall they be called to account for the same, and with respect to the causes or demands against them, the same shall be observed as provided for the deputies of the general congress.

6th. As the form of its government is representative, popular, and federal, and, in order to its exercise ought to be divided into the three powers, legislative, executive and judicial, the first is vested in congress.

7th. The executive power shall be provisionally deposited in one sole person, who shall be styled the Governor of the State, and shall be appointed by congress.

8th. For the better discharge of his functions congress shall appoint him a council, composed of a vice governor and four other persons, the former supplying any default of the governor in case of vacancy, or should he be rendered unable to discharge his office by moral or

physical impediment. The Governor shall consult with this council on all occasions he shall deem proper, and it shall be his duty to do so in all cases, and in the manner the laws do now or shall hereafter provide.

9th. The ordinary powers granted the executive of the Union by the constitutive act shall constitute his powers in the state, with the exception of such as are exclusively reserved to the federation in the same act.

10th. The judicial power shall for the present be vested in the authorities, by which it is now exercised in the state, and in the administration of justice they shall be governed by the laws in use, so far as they are not opposed to the form of government adopted.

11th. All officers, authorities, and corporations, both civil and military, belonging to the state are hereby for the present confirmed, and in the exercise of their functions they shall be governed by the same laws, and in the same terms as specified in the foregoing article.

12th. It is established according to settled and universal principle that the inhabitants of the state, of whatever class or rank they may be, can only be burthened in the same proportion as those of the other states of the Union.

The governor *ad interim* of the state, for the fulfilment thereof, shall cause the same to be published and circulated.

Given at Saltillo, on the 15th of August, 1824.

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### DECREE No. 2.

The Constituent Congress of the State of Coahuila and Texas has thought proper to decree as follows:

1st. All the authorities, corporations, and officers of the state, of whatever class or rank they may be, shall take the oath to acknowledge and to obey the constituent congress of the state.

2d. All the towns, the clergy both secular and regular, and all the military corps of the state shall take the same oath.

3d. The said oath shall be administered in the following form, viz. In whatever relates to the internal government thereof, do you recognise the sovereignty and independence of the free state of Coahuila and Texas, represented by its constituent congress, elected according to the constitutive act, and other decrees relative to the institution thereof?—Yes, I do acknowledge. You solemnly swear to obey and to observe the laws and decrees that shall issue therefrom? Yes, I do swear. So help you God, and should it not be thus you shall be responsible to the state, according to the laws. In the oath that shall be taken by the authorities, after the word "*observe*" shall be added "*and cause to be observed.*"

4th. The vice governor and other members of the council (when appointed) shall take the oath of recognition and obedience to the congress in the hall of its sessions on the day the said congress shall

appoint. The former shall take the oath after the special form, approved for the effect for himself and the governor, who has already taken the same.

5th. The ayuntamiento, the superior officers attached to apartments for public business, and the Prelate of the religious order of San Francisco of this capital, shall take the oath before the governor of the state; those without the capital before the first constitutional alcalde, or the person acting in his place, and their subordinates before their respective superiors.

6th. The venerable secular clergy of the state shall take the oath of recognition and obedience to congress in the form that the Governor of the Mitre of Nuevo Leon, and the Rev. Bishop of Durango shall determine.

7th. The people shall take said oath before their respective ayuntamientos in the manner, and on the day, the latter shall agree; and the same shall also administer the oath to the first alcaldes previous to taking it themselves.

8. The chiefs, officers and privates of the militia of the state shall take the oath, with their colors placed in front.

9th. Corresponding attested copies of all these acts shall be forwarded to the governor of the state, who shall transmit the same to congress for its intelligence, and for the purpose of having them entered in the archives, reserving due evidence in his secretary office, in order to exact those that are wanting.

For the fulfilment thereof, the governor of the state shall cause the same to be published and circulated.

Given at Saltillo, the 16th of August, 1824.

### DECREE No. 3.

The Constituent Congress of the State of Coahuila and Texas has thought proper to decree as follows:

That for the present, and until the constitution of the state shall be published for issuing and publishing the decrees of congress, the following forms shall be used:

“The constituent congress of the free, independent and sovereign state of Coahuila and Texas has thought proper to decree as follows:

“For the fulfilment thereof, the governor *ad interim* of the state shall cause the same to be published and circulated.”

For publishing decrees, “The governor *ad interim*, appointed by the sovereign congress of this state, to all unto whom these presents shall come, know ye: that congress has decreed as follows: [The decree to be here inserted.] “I therefore command all the authorities of the state, civil, military and ecclesiastical, to observe, and cause to be observed, to fulfil and to execute the present decree in all its parts.”

For the fulfilment thereof, the governor *ad interim* of the state shall cause the same to be published and circulated.

Given at Saltillo, on the 17th of August, 1824.



## DECREE No 4.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

The happy installation of the congress of the state having already been celebrated with joy in this capital, the same shall be observed in the rest of the towns, chanting a solemn *Te Deum* in all the parish churches, attended by the authorities, as an act of gratitude to the Supreme Being for so memorable an event; and public prayer shall be offered for three days in all the churches of the state, imploring divine aid to guide the deliberations of congress.

The governor, for its fulfilment, shall cause the same to be published and circulated.

Given at Saltillo, the 20th of August, 1824.

## DECREE No. 5.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

1st. The style of address of congress, both verbally and in writing, shall be impersonal, and it shall have the title of Honorable.

2d. The style of address of the president shall be that of Excellency; and of the secretaries, that of lordship, in official correspondence only.

3d. The governor's style of address shall be that of Excellency, in official correspondence.

4th. The lieutenant-governor, when acting as governor shall have the same style of address.

The governor of the state *ad interim* shall cause the same to be published and circulated for its fulfilment.

Given at Saltillo, the 21st of August, 1824.

## DECREE No. 6.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

Corporations without the capital, that have to congratulate congress, shall do so in writing, and not through the intervention of a third person.

The governor of the state *ad interim* shall cause the same to be published and circulated for its fulfilment.

Given in Saltillo, the 24th of August, 1824.

## DECREE No. 7.

The Constituent Congress of the state of Coahuila and Texas, in exercise of the powers granted the same by decree of the general congress of the 13th of July last, and in compliance with the other

provisions therein, relative to the elections of deputies to the future constitutional congress, in order that the election of those corresponding to the state may be made, has thought proper to decree as follows:

**ARTICLE 1.** For the chamber of representatives of the general congress, the state of Coahuila and Texas shall appoint one deputy *proprietor*, and one suppletory.

**ART. 2.** Said deputies shall possess the qualifications specified in the articles of the constitution, comprised in the decree of the 13th of June of the current year.

**ART. 3.** The deputies of the constituent congress of the state cannot be appointed either primary or secondary electors.

**ART. 4.** Primary, secondary and state juntas shall be holden for the election of deputy *proprietor*, and suppletory.

**ART. 5.** The primary meetings shall be holden on the third, and the secondary on the fourth Sunday of September next, and those of the state shall be holden in this capital on the third Sunday of October.

**ART. 6.** The primary meetings shall be presided over by the first *alcalde*, or the person in his place, in the respective municipality; the secondary, by the first *alcalde*, or the person acting in his stead, in the chief town of the district, and the third junta by the governor of the state.

**ART. 7.** In all other respects, the meeting shall be holden according to the provision of the convocation law of the 17th of June, 1823, relative to the election of deputies to the general congress.

**ART. 8.** The provision of the decree of the 4th instant shall be borne in mind, and observed in the state juntas.

For its fulfilment, the governor of the state *ad interim* shall cause it to be published and circulated.

Saltillo, August 28th, 1824.

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#### DECREE No. 8.

The Constituent Congress of the state of Coahuila and Texas has thought proper to decree as follows:

1st. The constituent congress of the state having been installed agreeably to the constitutive act, the political chief, and the deputation of Texas, have ceased in their functions, as has already taken place with respect to the authorities of the same class in Coahuila.

2d. Said authorities, on retiring, shall provide that their respective archives be delivered by a formal inventory, those of the political chief to the governor of the state, and those of the deputation to the secretaries of congress.

For the fulfilment thereof, the governor of the state shall order it to be published and circulated.

Saltillo, August 28th, 1824.

## DECREE No. 9.

The Congress of the state of Coahuila and Texas, exercising the powers granted the same by articles 8 and 9, of the decree of the general congress of the 4th instant, in compliance therewith, also with the 12th regulation, which the supreme executive transmits annexed to the same, has thought proper to decree as follows:

1st. A public session shall be holden on Sunday the 24th instant, at which the constitution of this republic shall be read entire, also the decree of the general congress relative to the oath of observance thereof.

2d. On conclusion of the reading, the president of congress, after taking the oath administered by one of the secretaries, shall administer the same to the deputies, and it shall be taken by all after the form of article eleven of the decree aforesaid.

3d. The governor of the state shall then present himself in the hall of sessions, and take the same oath; and on conclusion of this act, the officers shall proceed to the parish church, where a solemn mass shall be said as an act of gratitude, and the authorities shall be present.

4th. These, and the other corporations, and officers of the state, of whatever class or rank, shall swear to observe the federal constitution of the Mexican republic after the form aforesaid, and in the following terms:

5th. The ayuntamiento, ecclesiastical authority, superiors attached to establishments for public business, and the prelate of the religious order of San Francisco of this capital, shall take the oath before the governor of the state. Those elsewhere before the president of the constitutional ayuntamiento, and their subordinates, before their respective superiors. Ecclesiastics present, in the capital, shall take the oath before the curate, and those of the religious order before their prelate.

6th. Presidents of ayuntamientos, in other parts of the state, shall take the oath before said corporations; which, as also that of the capital, shall administer it to the people after the customary form.

7th. The chiefs, officers and privates of the militia of the state shall take the oath with their colors placed in front.

8th. The attested copies and certificates provided in the 13th article of the decree of the general congress, and ordered by the 12th article of regulations of the supreme executive to be forwarded by duplicate to the department of relations, shall be transmitted by triplicate to the governor, that due evidence may remain in his archives, whereof he shall give notice to congress.

For its fulfilment, the governor of the state *ad interim* shall cause it to be published and circulated.

Given at Saltillo, on the 21st of October, 1824.

DECREE No. 10.

The Constituent Congress of the state of Coahuila and Texas has thought proper to decree as follows:

1st. That at the church festival on the morrow, and others which the governor of the state shall attend from etiquette, he shall be received with the solemnities prescribed by the Roman Ritual and laws of the Indies for receiving patrons.

2d. That the attendance of the governor in the parish church on the morrow, being the first entrance therein from ceremony, the solemnities provided for these occasions by the ritual and said laws, shall be observed in his reception.

For its fulfilment, the governor *ad interim* of the state shall cause it to be published and circulated.

Given in Saltillo, on the 23d of October, 1824.

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DECREE No. 11.

The Congress of the state of Coahuila and Texas has thought proper to decree the following:

1st. The governor shall estimate, as nearly as practicable, the quantity of stamped paper of the different kinds required for the consumption of the state for the rest of the year, and for the whole of 1825, and agreeably to the order of the national executive, issued by the treasury department, bearing date the 2d of November, he shall demand it of the officers where it is on hand, and where, by previous direction of the said executive, it was ordered to be retained.

2d. The same shall be received with the proper specified account, and agreeably to the requisition prescribed in the aforesaid order of the 2d of November.

3d. In pursuance thereof, that the same be legalised by the state, the governor shall order a seal engraved, bearing the following inscription: *Legalised by the State of Coahuila and Texas for the two years term of 1824 and 1825.*

4th. For the sake of economy, and that all the towns of the state may be more readily supplied with the article, the agents of the tobacco establishments of this capital, and the city of Monclova, shall transact this business for the present; said agents, and others of the same class, remaining in charge of the directions and issue thereof, under the immediate inspection of government; in all other respects, the law of the 6th of October, 1823, relative to stamped paper, shall be observed so far as it is applicable to the state.

5th. The revenue arising from stamped paper being one of the rents corresponding to the state, the governor shall, from the 1st instant, apprise the agents employed in the offices to which the quantity on hand is remitted, that from the date aforesaid until its issue, legal-

ised by the state, the proceeds of the sale thereof belong to the state; at the same time they shall keep an exact account of the value of the same, to show what this branch produces to the state revenue.

6th. Notwithstanding there is known to be no official paper of the 4th stamp among the various kinds in this capital, for such use as the above mentioned law on the subject provides for that of this description, the governor shall direct another stamp to be made, bearing the rubric *official*, to be impressed upon paper of the 4th stamp, on the part required.

7th. It being the duty of the governor to attend to collecting the seals on completing the legalisation of the paper, should there happen to be a deficiency in any of the different kinds, during the two years term of the issue thereof, the agents entrusted, with the concurrence of the first *alcalde*, or the person officiating in his place in the town, shall legalise the quantity required, and they shall solicit the same for this object: the agent of Monclova shall give notice of the quantity he shall have legalised to supply any deficiency, until he can be furnished therewith.

8th. Until a new seal shall be engraved for drafts and receipts with the inscription and requisites provided in the 1st section of the aforesaid law of the general congress, which the executive shall order to be executed as soon as possible, the latter shall demand of the agency of Monclova the quantity of that description required for supplying this capital and Parras.

For its fulfilment, the governor of the state *ad interim* shall cause the same to be printed and circulated.

Given in Saltillo, the 2d of October, 1824.

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#### DECREE No. 12.

The Congress of the State of Coahuila and Texas, in view of the official communication from the executive, wherein is copied the question proposed by the President of the Ayuntamiento of Monclova, relative to the change of offices on the ensuing election, has thought proper to decree as follows:

1st. As it is proper and beneficial to the towns of the state that, between the government and the inhabitants thereof, there should be such proportionality as is compatible with good order, and a more successful administration, the ayuntamientos, as regards the number of their *REGIDORES* and *SINDICOS*, shall conform to art. 4, of the law of the 23d of May, 1812, and the provision of the article following of said law, shall be without effect—and in respect to the manner and form of their renewal, the same shall be effected according to the practice observed agreeably to the constitution and Spanish laws, prior to the decree of the general congress of the 27th of November, of the year last past, with the exception of Monclova and Bexar, where, on account of their having been capital towns, so many indi-

viduals, of those who have been longest in office, shall retire as to reduce the number left to one half of that which is to compose the ayuntamiento ensuing.

2d. This decree shall be immediately circulated by the executive to all the towns of the state, in order that those which shall not have done so at the time of receiving it, shall conform to the same at the ensuing election.

For the fulfilment thereof, the governor of the state *ad interim* shall cause it to be published and circulated.

Given in Saltillo, on the 14th of December, 1824.

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### DECREE No. 13.

The Congress of the State of Coahuila and Texas has thought proper to decree as follows:

ART. 1. In that part of this State formerly known as the Province of Texas, a political authority shall be provisionally established, styled "Chief of Department of Texas."

ART. 2. The political government of the department shall be vested in the said chief, who shall be under proper subordination to the governor of the state; pursuant thereto, it shall belong to his trust to watch over the public tranquillity, good order, the security of the persons and property of the inhabitants thereof, to see to the execution of the laws and orders of the government, and generally to attend carefully to all that pertains to the public order and prosperity of the department. As he shall be responsible for abuse of his authority, so shall he be by all persons promptly respected and obeyed. He shall not only have power to inflict, in his administrative capacity, the penalties imposed by the police laws and edicts for good government, but he shall also be authorised to impose and to exact fines of from one to one hundred dollars on those who do not obey and respect him, and of those who disturb the public order and tranquillity.

ART. 3. In the cases aforesaid, he shall also have power to impose a correctional penalty of fifteen days in public works, or one month's arrest, according to circumstances, on persons incapable of meeting the fine.

ART. 4. In cases where the public good and safety of the department require the arrest of any person, he shall have power to issue orders to that effect, but upon the express terms, that within forty-eight hours he shall place the said person at the disposal of a competent tribunal or judge.

ART. 5. The local militia of the department shall be subject to his orders, and he shall attend to the organisation and regulation thereof in conformity to the laws.

ART. 6. He can require of the military commandant such aid as he shall need, to preserve and to restore the tranquillity of the towns, and safety upon the roads.

**ART. 7.** He shall be careful to examine and to issue, either of himself or by his subordinates, according to the laws, the passports of all persons coming to or going from the department, including those arriving from or going to a foreign country.

**ART. 8.** He shall attend actively and efficiently to every thing that shall contribute to the safety of the coast, and give prompt notice to the government of whatever shall occur in that section deserving its attention, without failing to take provisionally, either of himself or by his subordinates, such precautions as he shall think necessary for its safety.

**ART. 9.** He shall take care, that in his department no individual shall appropriate to himself any land; and, with respect to those who have done so, he shall give circumstantial information thereof to government, that the same may take such measures as it shall deem necessary.

**ART. 10.** He shall form the census and a statistical account of his department, at as early a period as possible, and forward the same to the government.

**ART. 11.** The ordinary residence of the chief of the department shall be at the city of Bexar, unless imperious circumstances shall require his presence in other parts of the district under his command.

**ART. 12.** Said chief shall preside over the popular juntas, which, agreeably to the laws, require the attendance of the superior political authority. He shall also preside over the ayuntamiento of the place where he resides; and when, from any cause, he shall be in another town of the department, he shall have power to preside at the ayuntamiento thereof, should he judge proper, but without having a vote in either, except the casting vote in case of a tie.

**ART. 13.** He shall preside at all the public festivals which the law requires him to attend, and officially only: the style of his address shall be that of Lordship.

**ART. 14.** He shall see that all the ayuntamientos in the department discharge the obligations and trusts imposed upon them by the laws that are now, or shall be hereafter in force.

**ART. 15.** He shall be the sole channel of communication between the ayuntamientos and the government, except in cases of complaint against himself, on the part of the ayuntamientos, which can be made directly to the government. Moreover, he shall take care to circulate in all the departments the laws and decrees communicated to him by the executive, causing the same to be strictly observed.

**ART. 16.** Should any one, or more, of the members of the ayuntamientos of his department fail to comply with their official or administrative duties, on having a justifiable cause, he shall have power to suspend the same, giving immediate notice thereof to the executive, with the respective record.

**ART. 17.** It shall be the duty of the chief of the department to take cognisance in applications and doubts that occur, with regard to

determining upon official letters of the ayuntamientos, which he shall decide executively, in an instructive manner, without a judicial contest or debate, according to the existing arrangements.

ART. 18. All administrative records, relative to complaints, doubts, or remonstrances, of the towns and individuals, shall be issued gratis in the department.

ART. 19. He shall inform the executive of the abuses he may observe in the administration of justice, and in that of the public rents of that department.

ART. 20. He shall also, through the medium of the governor of the state, give notice to congress, with the data to support the charge, of the infringements of the constitution he may observe in his department.

ART. 21. He shall not interfere in any subject of litigation, nor officiate as conciliator.

ART. 22. Said chief shall have a secretary, appointed by himself, and approved by the governor, on whose proposal congress shall determine the salary the said officer shall receive, and also the expense of the secretary's office.

ART. 23. The governor of the state, with the knowledge of congress, shall appoint the chief of department, and shall propose the salary that ought to be assigned the same.

ART. 24. The aforesaid chief, for the better discharge of his attributes, shall have power to employ his subordinates, and should he moreover think it necessary to have the assistance of another person, on account of the extent of his department, and the various places requiring his attention, he shall inform the governor of his views on the subject, who shall communicate the same to congress, that the latter may provide as shall be proper.

ART. 25. In case of sudden impossibility, or temporary inability on the part of the chief of department, the ex-alcalde of the principal town shall officiate in his place until the executive provides as shall be expedient.

For the fulfilment thereof, the governor *ad interim* of the state shall cause the same to be published and circulated.

Given at Saltillo, the 1st of February, 1825.

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#### DECREE No. 14.

The Congress of the state of Coahuila and Texas, exercising the powers granted the states by the general congress, in the decree of the 22d of December last, has thought proper to decree:

A three per cent. duty of consumption shall, for the present, be established in the custom house of this capital, and the receiver's office of Parras only, upon foreign effects, upon the invoices made in the maritime custom houses at the time of the introduction thereof.



The governor *ad interim* of the state, for the fulfilment thereof, shall cause the same to be published and circulated.

Given at Saltillo, on the 15th of February, 1824.

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DECREE No. 15.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

ART. 1. In the different places to which it belongs, and where the same have not yet had their due and entire effect, the executive shall order the immediate fulfilment of the decree of the general congress of the 9th of February, of the year last past, the provisions of the supreme executive of the 12th of the same month, and the regulations of the 8th of December last, relative to the new project and arrangement of the tobacco income.

ART. 2. Should there be no judges in this capital capable of duly attesting and classifying the various kinds of tobacco, the value of which has to be paid to the holders thereof, according to its class, the executive shall order that of the tobacco, which, on examination, thereof for this sole object in the places where it is found to exist, shall prove to be profitable and fit for consumption, both crude and manufactured, the necessary quantity shall be forwarded to the manufactory of Mexico, that the same may be duly attested and classified, taking measures to prevent the transportation thereof being attended with unnecessary expense.

ART. 3. The executive, after being informed of the classification of the different kinds of tobacco, shall take care that the value thereof be punctually paid within such prudential term as he shall compute to be consistent with the different attentions of that branch of the revenue.

ART. 4. After the publication of this law in the chief towns of the districts, the sale and consumption of tobacco, crude and manufactured, shall be prohibited; in pursuance thereof, the state alone can hereafter expend and provide for the consumption thereof in the towns of the same, for which purpose a cigar manufactory shall be established in this capital, as soon as possible, for paper cigars and other kinds, with such officers as are absolutely necessary. The executive shall propose the number and class of the same, their salaries, shall frame suitable regulations; of all which he shall give notice to congress for approval.

ART. 5. To put the manufactory in operation, and to give life and activity to the income, the executive shall contract a loan of the amount he shall deem necessary, on the most suitable basis and conditions; making to the contractor such proposals as are just, and capable of being punctually fulfilled, likewise admitting proposals of the same kind; for all which he shall have sufficient power.

ART. 6. During the interval, until the regulations specified in article

4 are approved, he shall be likewise duly authorised to protect the financial concerns, and faithful management of the manufactory, taking all such measures as he shall deem seasonable and prudent, to have the purchases of paper made at the most reasonable prices; but as this article is very dear at present, to compensate for the high price thereof, two cigars shall be deducted from each bunch, and in the places where the cigars are sold, it shall be expressly prohibited to exact any other tax from any cause, and on any pretence whatever.

ART. 7. As regards the organisation of this rent, proper provision shall shortly be made in the plan for the provisional regulations of all the state rents, to be decreed by another law.

For the fulfilment thereof, the governor of the state *ad interim* shall cause the same to be published and circulated.

Given at Saltillo, on the 19th of February, 1825.

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### DECREE No. 16.

The Constituted Congress of the state of Coahuila and Texas, desiring by every possible means to augment the settlement of its territory, to advance the raising and increase of stock, and the progress of the arts and commerce, in conformity to the constitutive act, the constitution of the republic, and the basis established by decree No. 72, of the general congress, has thought proper to decree the following

### COLONISATION LAW:

ART. 1. All foreigners who, in virtue of the general law of the 18th of August, 1824, which gaurantees the security of their persons and property in this republic, shall wish to emigrate to any of the settlements of the state of Coahuila and Texas, are permitted to do so; and the said state invites and calls them.

ART. 2. Those who shall thus emigrate, far from being molested, shall be admitted by the local authorities of said settlements, and permitted by the same freely to engage in any honest pursuit, provided they respect the general laws of the republic, and the laws of the state.

ART. 3. Any foreigner, already arrived in the state of Coahuila and Texas, who shall resolve to establish himself, and become domiciliated therein, shall make a declaration to that effect before the ayuntamiento of the place he shall select as his residence, by which, in that case, he shall be sworn to obey the Federal and State constitution, and to observe the religion prescribed in the former; and his name, and those of his family, if he have any, shall be registered in a book to be kept for the purpose, specifying the place he is from, his age, occupation; whether he is married, and that he has taken

the oath prescribed, considering him henceforth, and not before, as domiciliated.

ART. 4. Any foreigner, from the time he is domiciliated agreeably to the foregoing article, shall be permitted to specify any vacant land, and it shall be the duty of the respective political authority to forward the instrument that shall be drawn to the executive for his approval, should he consider the applicant the same as the natives of the country, conforming to the existing laws on the subject.

ART. 5. Foreigners of any nation whatever, and natives of this republic, can project the formation of new towns upon lands entirely vacant; and, in the case of article 35, even upon those privately appropriated; but the new settlers, who present themselves to be admitted, shall prove, by certificate from the authorities of the place from which they came, their christianity and good moral character.

ART. 6. Foreigners, who shall arrive at a time when the general congress shall have prohibited their entrance for the purpose of colonising, as after the year 1840, the same will have power to do, or sooner with respect to those of some nations, shall then not be admitted; and those who shall apply within the proper time, shall always submit to such precautionary measures for the safety of the federation, with regard to themselves, as the supreme executive, without prejudicing the object of this law, shall adopt.

ART. 7. The executive shall take care that within twenty frontier leagues bordering on the United States line, and ten littoral leagues upon the coast of the Gulf of Mexico, within the limits of the state, no other settlements shall be made than such as shall meet the approbation of the Executive of the Union, to whom all future petitions on the subject, accompanied by a corresponding report, shall be transmitted.

ART. 8. Projects for new settlements, wherein one or more persons shall offer to bring, at their own expense, one hundred families, or more, shall be presented to the executive; who, on finding them in conformity to this law, shall admit the same, and immediately designate to the contractors the land whereon they shall establish themselves, and the term of six years, within which they shall present the number of families for which they contracted, under the penalty of losing the rights and privileges offered in their favor, in proportion to the number of families they shall fail to introduce, and of the contract becoming absolutely null, should they not present one hundred families at the least.

ART. 9. Contracts made by the contractors or *empresarios* with the families which come at their expense, shall be guaranteed by this law, so far as they are in conformity with the provisions thereof.

ART. 10. In the distribution of lands, a preference shall be given to the military, in consideration of the patents issued them by the supreme executive entitling them to land, and to Mexican citizens not military, between whom no other distinction shall be made than

such as is founded in their special merit and services rendered the country, or in equal circumstances, a residence in the place where the land is situated. The quantity, whereby the lands are to be distributed, shall be designated in the following articles:

ART. 11. A square of land measuring one league, consisting of five thousand varas on each side, or what is the same thing, a superficies containing twenty-five million varas, shall be called a sitio, and this shall be the unit for enumerating one, two, or more sitios, in the same manner as one million square varas, or one thousand varas on each side, which shall constitute a labor, shall be the unit for counting one, two, or more labores. The vara for this measure shall consist of three geometrical feet.

ART. 12. Adopting the aforesaid unit as a standard, and observing the distinction to be made on distributing lands, between grazing lands or those suitable for raising stock, and irrigable tillage land, and that which is not irrigable, this law shall grant to the contractor or contractors for forming new settlements, five sitios of grazing land, and five labores, of which at least one-half shall be land not irrigable, for every hundred families they shall introduce and establish in the state; but they shall receive this premium only for eight hundred families, although they should introduce more; and no fraction whatever, not completing one hundred, shall entitle them to a premium, not even proportionally.

ART. 13. Should any contractor or contractors, on account of the families they shall have introduced, be entitled, according to the foregoing article, to more than eleven square leagues of land, it shall be granted them, but they shall be obligated to alienate the excess within twelve years; and should they not, it shall be done by the respective political authority at public sale, delivering the proceeds to the owners thereof, after deducting the costs of sale.

ART. 14. One labor shall be granted to each family included in the contract, whose only occupation is the cultivation of the soil; and should the same also raise stock, grazing land shall be added to complete a sitio; and should the raising of stock be the exclusive occupation, the family shall receive a superficies of twenty-four million square varas, (being a sitio lacking one labor.)

ART. 15. Unmarried men shall receive the same quantity on marrying, and foreigners, who marry natives of the country, shall receive one-fourth more; those who are entirely single, or who do not compose a part of any family, contenting themselves rather with the fourth part of the quantity aforesaid, which shall be computed to them on the assignment of their land.

ART. 16. Families and single men who, having emigrated separately and at their own expense, shall wish to annex themselves to any of the new settlements, can do so at all times, and the same quantity of land shall be respectively assigned them, as specified in the two foregoing articles; but should they do so within the first six years from the establishment of the settlement, one labor more shall

be granted to families; and single men, instead of one-fourth, as specified in article 15, shall receive one-third.

ART. 17. It shall belong to the executive to increase the portions specified in articles 14, 15, and 16, in proportion to the family, industry, and activity of the colonists, according to the separate reports upon the subject that shall be rendered by the ayuntamientos and commissioners; always bearing in mind the provision of article 12th, of the decree of the general congress on the subject.

ART. 18. Families that shall arrive conformably to the 16th article, shall present themselves forthwith to the political authority of the settlement they shall have selected; who, recognising on their part the necessary conditions required by this law, shall admit the same, put them in possession of the lands to which they are entitled, and give notice immediately to the executive, that the same of himself, or through persons he shall commission for that purpose, may issue them their titles.

ART. 19. The Indians of all nations bordering on the state, as well as the wandering tribes within the same, shall be admitted in market exempt from all duties in their traffic in the effects of the country; and should any of the same, being attracted in this manner, and by the mildness and confidence with which they shall otherwise be treated, wish to establish themselves in any of the settlements, after declaring themselves in favor of our institutions and religion, they shall be admitted, and share the same quantity of land as the settlers specified in articles 14 and 15, always preferring native to foreign Indians.

ART. 20. That no vacancies be left between the tracts, which shall be carefully avoided in the distribution of lands; it shall be laid off in squares or other forms, although irregular, should the locality so require; and to prevent litigation and dispute in making the distribution aforesaid, as well as in the designation of sites, whereon new towns are to be founded, the adjoining proprietors, should there be any, shall be previously notified.

ART. 21. Should any appropriated land be taken possession of through error in concession, on proof thereof an equal quantity of land entirely vacant shall be granted to the person who obtained the same; and, moreover, he shall be indemnified by the owner of the land aforesaid, agreeably to a just estimate made by competent judges, and according to the laws, for the expense he has incurred in the improvements that shall appear thereon.

ART. 22. The new settlers shall pay to the state, as an acknowledgment for each sitio of grazing land, thirty dollars; for each labor, not irrigable, two and a half; and for each that is irrigable, three and a half; and so on, proportionally, according to the class and quantity of land distributed to them; but the payment thereof need not be completed under six years from settlement, and in three instalments: the first in four, the second in five, and the third in six years, under

a penalty of forfeiting the land for a failure in any of the said payments; the contractors and the military mentioned in article 10, shall be exempt from this payment; the former as regards the lands granted them as a premium, and the latter, for that which they obtain agreeably to their patents.

ART. 23. The ayuntamientos, each in its own limits, shall collect the aforesaid funds gratis, by a committee appointed from within, or without, their own body; and shall remit the same, as fast as collected, to the depositary or treasurer of their funds and means, who shall give the corresponding receipt, for no other compensation than two and a half per cent. which is all that shall be allowed him, and who shall hold the said funds at the disposal of the executive, giving an account monthly of the amounts received and remitted, and of any remissness or fraud he shall observe in their collection. The treasurers and committees shall be held responsible with their property for their management, and moreover the individuals of the ayuntamiento that shall appoint them; and, that this responsibility may at all times be effectual, the said appointments shall be made viva voce, and information thereof shall be immediately given to the executive.

ART. 24. The government shall sell to Mexicans, and to them only, the lands they shall wish to purchase, but shall take care that there shall not be united in the same hands more than eleven leagues, and subject to the condition, that the purchaser shall cultivate those he shall acquire by this title within six years from the acquisition, under the penalty of forfeiting the same. Allowing the aforesaid condition, the price of each sitio shall be one hundred dollars for grazing land; one hundred and fifty for tillage land not irrigable, and two hundred and fifty for irrigable tillage land.

ART. 25. Until the expiration of six years from the publication of this law, the legislature of the state cannot alter the same in the provisions thereof, relative to the acknowledgment and the price that shall be paid for the lands, and the quantity and class, whereby the same shall be distributed to the new settlers, and sold to Mexicans.

ART. 26. It shall be understood that the new settlers who shall not, within six years from the date of their possession, have cultivated or occupied, agreeably to their class, the lands that shall be granted them, have renounced the same; and the respective political authority shall immediately proceed to take back from them the lands and titles.

ART. 27. The contractors and the military, already mentioned in their turn, and those who have acquired lands by purchase can alienate the same at any time, provided the successor obligates himself to cultivate the same within the same term as was obligatory on the part of the original proprietor, likewise reckoning the term from the date of the primitive titles. The other settlers shall be authorised to alienate their land, when they shall have completed the cultivation thereof, and not before.

ART. 28. Every new settler, from the time of his settlement, shall be permitted to dispose of his land, although it shall not be cultivated,

by testament made in conformity to the laws that are now, or shall hereafter be in force; and should he die intestate, his lawful heir or heirs, shall succeed him in the enjoyment of his rights and property, assuming in both cases the obligations and conditions incumbent on the respective grantee.

ART. 29. The lands acquired by virtue of this law shall not be held in mortmain by any title whatever.

ART. 30. New settlers, who shall resolve to leave the state, to establish themselves in a foreign country, shall be at liberty to do so with all their property, but after thus leaving, they shall no longer hold their land; and should they not have previously disposed of the same, or should not the alienation be in conformity to art. 27, it shall become entirely vacant.

ART. 31. Foreigners who shall have obtained land according to this law, and established themselves in the new settlements, shall, from that time, be considered naturalised in the country; and by marrying natives of the republic, they shall possess a special merit for obtaining letters of citizenship of the state, saving what the constitution of the state, on either subject, shall provide.

ART. 32. During the first ten years from the time the new settlements are founded, the same shall be free from all taxes of whatever denomination, except such as shall be generally imposed to prevent or repel foreign invasion, neither shall the products and effects of agriculture and industry pay excise, or other kinds of impost, in any part of the state, except only the duties to which the following article refers; after the expiration of the aforesaid term, the new settlements shall be liable to the same burthens as the old, and the colonists the same as the other inhabitants of the state.

ART. 33. The new settlers, from the time of their establishment, shall be free to promote any kind of industry; they shall also be permitted to work mines of every description, agreeing with the national executive with respect to those that pertain to the national revenue, and subjecting themselves in working the others to the ordinances and duties that are now, or shall hereafter be established, with regard to the business of mining.

ART. 34. Towns shall be founded on such sites as the executive, or the person commissioned by him for that purpose, shall judge most appropriate; and four square leagues shall be designated for each whose area may be regular or irregular as the locality shall require.

ART. 35. Should any of the sites aforesaid have been privately appropriated, and the establishment of the new towns therein be of notorious general utility, they may be appropriated to this purpose notwithstanding, after such indemnification as in the opinion of the appraisers shall be just.

ART. 36. Building lots in the new towns shall be given gratis to the contractors thereof, and to all kinds of mechanics those they shall need for their workshops, and to other settlers they shall be sold after valuation thereof—they shall be sold at public auction, and the

purchasers shall be obligated to pay the price of the same in three instalments, the first in six, the second in twelve, and the third in eighteen months. All the owners of lots, the contractors included, shall pay one dollar per annum for each lot, which, together with the proceeds of the sales aforesaid, shall be collected by the ayuntamientos, and applied to the building of churches in the said towns.

ART. 37. The towns shall consist, as nearly as possible, of natives and foreigners; and in laying off the same, care shall be taken to have the streets well laid out and straight, running parallel north and south, and east and west, as nearly as the land shall permit.

ART. 38. For the better situation, and the regular formation of the new towns, and the exact division of lands and lots, the executive, pursuant to his admission of any project and agreement with the contractor or contractors who shall have presented the same, shall commission a person of intelligence and probity, giving him such instructions on the subject as he shall deem necessary and proper, and authorising him, upon his own responsibility, to appoint one or more surveyors to execute the survey agreeably to the science, and perform such other agency as may offer.

ART. 39. The executive shall assign the commissioner his daily salary agreeably to the last fee bill for notaries of the ancient court of Oyer and Terminer of Mexico; and the latter, with the concurrence of the colonists, shall fix the surveyor's fees; but the expense, in both cases, shall be paid by the colonists, and in the manner the parties shall agree.

ART. 40. As soon as forty families at least shall be collected, they shall proceed to the formal establishment of the new town, and shall all be sworn by the commissioners to support the Federal and State constitutions; they shall then, for this first occasion, the commissioner presiding, proceed to the election of their municipality.

ART. 41. A new town, containing two hundred inhabitants or more, shall elect an ayuntamiento, should there be no other already established within eight leagues, in which case it shall be annexed to the latter. The number of individuals of which the ayuntamientos shall consist, shall be regulated by the existing laws.

ART. 42. Foreigners shall be qualified to elect, and to be elected, members of their municipal juntas, reserving the provision that shall be made by the constitution of the state.

ART. 43. The municipal expenses, and all such as are deemed necessary, or for the public good in the new towns, shall be proposed to the executive by the respective ayuntamiento through the channel of the political chief, accompanied by a plan of means which the said ayuntamiento shall conceive to be just and proper for covering the said expenses; and should the plan proposed be approved by the executive, he shall order the same to be executed, subject, however, to the resolution of congress, to whom it shall be immediately transmitted, with the report of the executive and that of the political chief thereon, who shall always state what occurs on the subject.



ART. 44. The executive shall send to the chief of department of Texas the individuals who shall be sentenced to fortresses as vagrants, and for other crimes, in the other parts of the state, for the purpose of opening and repairing roads, and for other public works in that department. The said criminals can be employed to work for private individuals for competent daily wages; and at the expiration of their punishment they shall be permitted to annex themselves to any of the new towns as colonists, and obtain the corresponding land, should they have reformed and become worthy in the opinion of the chief of department, without whose certificate, to that effect, they shall not be admitted.

ART. 45. The executive, in connection with the respective ordinary ecclesiastics, shall take care that the new towns are provided with a competent number of pastors; and, with the concurrence of the same authority, he shall propose to congress the salary to be paid them by the new settlers.

ART. 46. In respect to the introduction of slaves, the new settlers shall subject themselves to the laws that are now, and shall be hereafter established on the subject.

ART. 47. The petitions pending, upon the object for which this law provides, shall be despatched according to the same, and for this purpose they shall be passed to the executive; and all families established in the state, without yet having land legally assigned them, shall conform to the said law, and to what the executive of the Union shall direct, with respect to those who are within twenty leagues of the line of the United States of the north, and ten border leagues upon the coast of the Gulf of Mexico.

ART. 48. This law shall be published in all the towns of the state; and that the same may be known to the other states of the Union, it shall be communicated to the respective legislatures thereof through the secretary's office of this, and in compliance with article 161 of the federal constitution, the executive shall take special care to transmit a certified copy thereof to both chambers, and to the executive of the Union, requesting him to give general circulation to the said law through his ministers to foreign powers.

For its fulfilment, the governor of the state *ad interim* shall cause it to be published and circulated.

Given at Saltillo, March 24th, 1825.

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## DECREE No. 17.

### REGULATION OF THE SECRETARY'S OFFICE OF CONGRESS.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

ART. 1. The secretary's office shall, for the present, consist of a

superior officer, two clerks, and a porter; it being left to the judgment of the committee on police, with the concurrence of Congress, to increase the number of clerks or officers, as circumstances shall require.

**ART. 2.** The salaries of the said officers shall be as follows:

Superior Officer,	-	-	-	800
Clerks, (350 each)	-	-	-	700
Porter,	-	-	-	96
Office expenses,	-	-	-	150

Total, 1746 dollars.

**ART. 3.** The salaries aforesaid shall be paid by the treasury of congress at the end of every month, to receipts of the persons interested.

**ART. 4.** All those who serve in the secretary's office, shall comply with the orders given them by the secretaries of congress, on the despatch of any subject they shall commit to their charge.

**ART. 5.** They shall also be obligated to observe secrecy in all business wherein they are so required by any of the secretaries of congress.

**ART. 6.** They shall write the reports of the committees as the chairman thereof shall direct, and also the propositions of those deputies who shall not choose to write them themselves.

**ART. 7.** Until the office of keeper of the archives shall be filled, the clerk supplying that place, with the knowledge of the superior officer, shall furnish the secretaries of the committees, the deputies in particular, and the secretary of the executive, all the documents or antecedents they shall call for to obtain information, or to elucidate the affairs under their direction; likewise, every citizen any paper, whatever be the nature and contents thereof, of the secretary's office, he shall wish to read therein, except the secret papers; and in respect to the former, the clerk aforesaid, in a book destined to the purpose, shall keep an exact memorandum of the papers taken out and returned, or in progress, annexed to some record; and for due evidence thereof, the secretary of the committee, the particular deputy, or the secretary of the executive, and the clerk acting as keeper of the archives, shall affix their rubrics to the parcels taken out and returned, and the latter shall not receive any more compensation for this service than that assigned to his situation.

**ART. 8.** On days of session, ordinary and extraordinary, they shall attend in the office from 8 o'clock in the morning until the hour of adjournment; and in the evening from 4 o'clock until sunset, unless from some cause, in the judgment of the secretaries of congress, it shall be necessary to employ some hours of the night, when they shall remain as long as required.

**ART. 9.** On days when there is no session, they shall attend from 8 o'clock in the morning until 12; and in the evening from 4 until sunset.

served within the state, and of its safety without; disposing of the militia of the state for both objects, and in default thereof he shall demand the aid of the garrison stationed within the same. In case of invasion or internal movement, endangering the safety of the state, he shall dictate whatever measures he shall deem proper for defence, and for the restoration of order; giving immediate notice to his excellency the president of the republic, and to the congress of the state.

ART. 8. He shall freely appoint and remove the secretary of despatch; giving immediate notice to congress, and to the people, and making known the sign manual of those newly appointed.

ART. 9. He shall supply all the officers of the state, of Executive and not of popular appointment, conforming to the provisions of the laws.

ART. 10. He shall, for the present, with the advice of the council, exercise exclusive control in the provision, even of ecclesiastical officers of the state, according to the form to be prescribed by congress in a separate decree.

ART. 11. He shall see that justice is promptly and efficiently administered by the tribunal of the state, and that the decisions of the same are executed. He cannot for this inspection, interfere in the examination of causes pending, neither can he, in any manner, dispose of the persons of defendants in criminal cases during the trial.

ART. 12. He shall take care of the administration and collection of all the state rents, and decree the disposition of their proceeds only in such expenditures as congress shall approve; consulting the same in extraordinary expenses, unless they occur so imperious and pressing as not to allow time for the consultation, in which event the governor can dispose of the same himself, giving immediate notice to congress for approval.

ART. 13. He shall have power, after hearing the opinion of the Council, to suspend from office, as long as three months, and deprive them of one half their salary for the same length of time, all public servants connected with the executive administration, and of his appointment, or approval, should they fail strictly to discharge their duties, and in cases where he considers a judicial process ought to be instituted against them, shall he communicate the facts of the case to the respective tribunal. For infringement of the constitution or law, a process shall always be instituted.

ART. 14. Should one or more, the whole or a majority, of the individuals composing the ayuntamientos of the state abuse their powers, he shall have power, after hearing the council, to suspend the same; making known to congress the measure and motive thereof for the corresponding decision, and providing that the respective classes of the year preceding enter upon office in place of the persons suspended.

ART. 15. He shall take cognisance in appeals and doubts that occur in respect to elections, and in official letters of the ayuntamientos, and shall decide thereon discretionarily in his executive capacity,

and in an instructive manner, without judicial contest or debate. The power granted the executive, by this and the preceding article, shall be understood as not affecting that which belongs to the chief of the Department of Texas, in his respective district.

ART. 16. He shall see that the civic militia is modelled agreeably to the discipline prescribed, or to the provisions made by the general congress in new regulations.

ART. 17. That the governor may be duly respected and obeyed, upon those who do not respect and obey him he can impose fines discretionally to the amount of three hundred dollars, to be applied to the revenue of the state, or to any branch of public utility.

ART. 18. He shall consult the council on all important executive affairs; all business, of whatever department, from which a general rule of good government may result, being understood to be of this description.

ART. 19. He shall see that the provisions of the 8th and 9th clauses of article 161 of the constitution of the republic is fulfilled; communicating to congress a circumstantial and comprehensive notice of the particulars contained in the first of said clauses.

ART. 20. For any just reason, he can grant permission to the officers of the State, belonging to any branch of the executive administration, to retire from their duties for a time not exceeding two months. Should the leave of absence be for a longer time, he shall grant the same with the concurrence of the council.

ART. 21. He can appoint a public speaker from within or without the council, to exercise the voice of the executive in the case of articles 1, 2 and 6; and, when congress shall think proper, the same shall be present only at the debate.

ART. 22. He shall make use of his entire sign manual in communications with the high national and state authorities, with those of the other states, in the promulgation of the laws, and in commissions he shall extend to the officers. Otherwise, he shall use his partial sign manual.

ART. 23. Until the respective subordinate authorities are established, to whose charge the political and economical administration shall be committed from and after the sessions in which it shall be thought proper to divide the territory of the state, the governor shall exercise all those powers which, according to the law of the 23d of June, 1813, were exercised by the political chiefs of provincial deputations in the ancient form of government, so far as the same are not opposed to that recently adopted, and to the provision of this decree.

ART. 24. The governor shall preside over all the civil authorities of the state during public ceremonies. His style of address shall be that of his excellency, as heretofore provided, in official communications; and, on religious festivals, he shall be received with the etiquette prescribed by decree of the 23d of October, 1824, until the general congress shall regulate the exercise of the right of conferring benefice, (being that of patrons) throughout the republic.

**RESTRICTION OF THE POWERS OF THE GOVERNOR.**

**ART. 25.** He cannot command the local militia of the state in person, without the express consent of congress.

**ART. 26.** The governor cannot deprive any individual of his liberty, nor, of his own authority, impose corporal punishment; but when the safety and welfare of the state requires the arrest of any person, he can issue orders to that effect, on condition, that within forty-eight hours he shall place the persons arrested at the disposal of a competent tribunal or judge, manifesting at the same time, in writing, the cause of the arrest.

**ART. 27.** He cannot take possession of the property of any private individual, or corporation, or disturb the same in the peaceful possession, use, and benefit thereof; and should it, in any case, be necessary for any object of known public utility to take the property of a private individual or corporation, he cannot do it unless with the concurrence of the council, and in all cases he shall indemnify the party interested, agreeably to the decision of appraisers to be chosen by the executive and the said party.

**ART. 28.** He cannot impede elections, determined or that shall be appointed by the laws, nor can he prevent the same from having their due and entire effect.

**ART. 29.** He cannot leave the capital, to go to any part of the state, for a longer time than one month. Should he need a longer time, or should he be under the necessity of leaving the state, he shall apply to congress for permission.

*Section Second.**Appointment of the Executive Council and Attributes of the same.*

**ART. 30.** For the better discharge of the duties of his office, until the constitution is promulgated, the governor shall have a body for aid and advice, to be styled council of the executive; and the style of address of the same shall be that of his excellency. The same shall consist of the vice governor and four other individuals, of whom one only can be a clergyman.

**ART. 31.** The appointment of all the members of the council shall be made by congress by absolute majority of votes, and by secret inquiry. Service in this body, by the citizens appointed, shall be laudable in the state, and shall be regarded in the light of a municipal office, which no one can decline without a legal and satisfactory impediment in the judgment of congress.

**ART. 32.** To be a member of the council, it is required to be a citizen in the enjoyment of his rights, over twenty-five years of age, known to be in favor of the form of government adopted, and for this time only domiciliated in this capital, or its environs within six leagues thereof, to avoid the serious injury resulting to the citizens of the other

towns, should they be obliged to come to discharge the duties of stations, for the present served in the light municipal offices.

ART. 33. The vice governor shall preside over the council; and in his default, the first member in the order of appointment: but the governor, when he attends, shall preside, without having a vote.

ART. 34. The council shall hold ordinary sessions on the days appointed in the internal regulations thereof; also, extraordinary, whenever the governor shall request, or the said council agree thereon.

ART. 35. Both shall be holden in a hall of the capitol, appropriated to that purpose, with open doors; unless, in the judgment of the governor or the council, the subject be of a secret nature.

ART. 36. The secretary of the council shall be one of the members thereof, and appointed by the same.

ART. 37. The attributes of the council shall be as follows:

1. To render a written report to the governor on all affairs, wherein he is required by law to demand the same; likewise on all others, wherein he shall think proper to consult the council, in order to devise a proper course of action.

2. To attend carefully to the observance of the constitution, constitutive act, and laws of the Union, as well as the laws of the state, forming records on any infringements noticed by the same, and giving notice therewith to congress, through the channel of the governor, unless it be against himself, or his secretary.

3. To promote the establishment of, and give activity to, all the branches of prosperity in the state; proposing to the executive or to congress, as the case may be, all those measures and projects the council shall deem most effectual to augment the population, promote and give activity to agriculture, industry, commerce, public instruction, and whatever may conduce to the general utility of the state, for which purpose any of the members shall have the power to claim the attention of the council.

4. To propose ternary numbers, in cases required by law, for supplying offices, accompanied by a brief statement of the merits of the persons proposed.

5. To make remarks upon the accounts of the ayuntamientos and those of the several administrations or agencies of all branches, the products whereof enter the general state treasury, also those of congress, which shall be sent to the accountant's office of the council, through the channel of the executive, to be revised and commented upon when they shall be presented, accompanied always by information from the executive, to congress for approval.

ART. 38. The council, on proposing to congress, in virtue of the third attribute, projects of public utility, shall have power to appoint one of its own number to attend the discussion, and afford all possible information to enable that body to come to a just and correct decision thereon.

ART. 39. The council shall be responsible for all acts relating to the exercise of its attributes.

**ART. 40.** The office of the secretary of the council shall be divided into two departments, one for executive business, and one for accounts. The former shall consist of an officer, whose salary shall be five hundred dollars per annum, appointed by the governor on a nomination of three persons by the council; and of a clerk, whose salary shall be three hundred dollars; to be appointed and removed at the pleasure of the secretary of the council. The department of accounts shall also consist of an officer and a clerk; appointed and remunerated in the same manner as the former.

**ART. 41.** The project specified in the preceding article of offices and salaries thereof, of which the secretary's office is to consist, shall be understood as provisional, until experience and the course of business shall give the proper light for the final regulation thereof.

**ART. 42.** The secretary of the council shall form rules of economy for the administration of his office, and present the same to the council, who shall pass the same to the executive, accompanied by their report, to be presented with the decision of the latter to congress for approval. During the interval, they can be provisionally adopted, should the governor think proper.

**ART. 43.** The members of the council cannot leave the capital without licence from the executive, who shall have power to grant the same for two months. Should a longer time be required, or should they be under the necessity of leaving the state, they shall solicit permission from congress.

**ART. 44.** The vice governor, and other members of the council, shall present themselves in the hall of sessions of congress on a day appointed, and take oath to obey the constitution, the constitutive act, and the laws and decrees of the republic, and those of the state, and faithfully to discharge the duties of their office.

**ART. 45.** The council, in attending on public ceremonies, shall rank next to the governor.

### *Section Third.*

#### **SECRETARY OF STATE.**

**ART. 46.** The governor shall have a secretary, to be styled secretary of state, who shall have charge of all kinds of business whatever, pertaining to the executive department of the state.

**ART. 47.** To fill the said office, it shall be required to be a citizen in the exercise of his rights, over twenty-five years of age, a native of the republic, domiciliated in the state with three years residence therein previous to his appointment.

**ART. 48.** The style of address of the secretary, in official communications, shall be that of lordship, and he shall be considered the head of his office; wherein he shall appoint and remove the clerks at his pleasure: whose number and salaries shall be changed as the labors and their qualifications, in the opinion of the secretary, with approval of the governor, shall require.

ART. 49. All orders and decrees, regulations and instructions, circulated to the towns, or directed to a particular individual or corporation, shall be previously signed by the secretary, and without this requisite they shall not be obeyed.

ART. 50. The secretary of state shall be responsible to congress, with his person and office, for all orders and measures of the governor, which he shall authenticate with his signature, containing any disposition contrary to the constitution, constitutive act, and general laws of the republic, or the laws of the state, or the orders of his excellency the president of the republic, not manifestly opposed to the said constitution and laws, without availing himself, as a plea or excuse, of his having done so by order of the governor.

ART. 51. The secretary shall sign every copy emanating from the office under his charge, and shall present to the governor, monthly, a circumstantial notice of the number of subjects despatched in the said office, to be printed and circulated.

ART. 52. The secretary shall attend the sessions of congress when called upon to give information upon any subject of the executive department, and when ordered by the governor, to give any information. In the latter case he can also attend the council.

ART. 53. The orders of government, and all communications issuing from the secretary's office, printed or in manuscript, shall bear upon the top of the left margin the government seal, which shall also be stamped on the wrapper.

ART. 54. The seal shall contain, within the figure of an ellipsis, the eagle upon a nopal, crowned with the cap of liberty, with lines diverging therefrom, representing rays of light; the border of the oval bearing the following inscription: "Executive Department of the State of Coahuila and Texas."

ART. 55. The secretary shall form a set of internal regulations for his office, and present the same to the governor, who shall pass the same, accompanied by his report, to congress for examination and approval; directing that during the interval the regulations be observed, as revised by himself.

ART. 56. In attendance on public occasions the secretary shall take his place after the officers.

For its fulfilment, the governor of the state *ad interim* shall cause it to be printed, published and circulated.

Given in Saltillo, August 25th, 1825.

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#### DECREE No. 20.

##### *Appointment of Vice Governor and voters of the Executive Council.*

The Congress of the State of Coahuila and Texas, having proceeded, pursuant to the provision of section 2d of Decree No. 19 of the 25th instant, to the appointment of a Vice Governor and other members,



who are to compose the Executive Council of the State, has thought proper to decree as follows:

ART. 1. Jose Ignacio de Arispe, having received the absolute majority of the votes of Congress for that office is elected Vice Governor of the State pro tem.

ART. 2. Juan de Goribar, Jose Ignacio Sanches, presbyter, Jose Ignacio Alcocer, and Jose Ignacio de Cordenas, licentiate, having received the absolute majority of the votes of Congress, are elected Executive Councillors of the State, and shall severally be eldest in office according to the order of their appointment.

ART. 3. Said officers shall present themselves to congress at 12 o'clock on the morrow, to take the oath specified in article 44 of Decree No. 19, aforesaid.

ART. 4. The style of address of the vice governor, as president of the council, shall be that of his Excellency; and that of the councillors of lordship, in official communications only.

ART. 5. The governor is authorised to furnish all necessary expense to provide a hall, for the council to hold their sessions, in a style corresponding to their rank, and consistent with the condition of the treasury.

ART. 6. The governor shall appoint a day for the installation of the council, which he shall attend, to give greater solemnity to the act, giving previous notice to congress thereof.

For the fulfilment thereof, the governor of the state pro tem. shall cause the same to be published and circulated.

Given in Saltillo, on the 31st of August, 1825.

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#### DECREE No. 21.

##### *Extraordinary Powers of the Governor of the state pro tem.*

The Congress of the state of Coahuila and Texas, reflecting that the person who excites commotion and disorder under various pretexts will resort to seduction, deceit, and artifice of every kind to subvert the present form of government, commencing by offences committed against the highest authorities of the state; also, desiring at the same time to take proper measures to preserve order, and to save the state from the evils of anarchy that would result from the dissolution of the highest powers, has thought proper to decree as follows:

The governor of the state pro tem. is invested with extraordinary administrative powers, and without subjection to legal forms, to arrest those persons without distinction of rights of law, against whom there may be in his opinion a strong suspicion that they will attempt to disturb the public tranquillity, under whatever pretext; and also

to destine the said persons, for a time not exceeding three months, to such places in the state as he shall think most proper for the preservation of order; independent of the process he shall order to be instituted against them according to the existing laws, in the places to which they are destined; unless they are of the military, in which case, on being apprehended, they shall be delivered over to their respective commanders.

For its fulfilment, the governor of the state pro tem. shall cause it to be printed and circulated.

Given in Saltillo, on the 26th of February, 1826.

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### DECREE No 22.

#### *Restoring and preserving the public tranquillity in the State.*

The Congress of the state of Coahuila and Texas, satisfied that it is their principal duty to use their utmost efforts, and take all possible measures for the public safety, and that all necessary means should be exercised to restore and strengthen the confidence of the people in their representatives and others who from duty contribute to the maintenance of order, has thought proper to decree:

ART. 1. Every public functionary elected by the people, directly or indirectly, or appointed and approved by the government, who shall have signed, or in any evident manner supported, the turbulent and subversive pretensions, attacking the state sovereignty, that have been directed to congress, and exist in the original in the executive department, unless it shall appear by some official document that the same withheld his vote, shall be immediately suspended in the exercise of his functions.

ART. 2. Every ecclesiastical judge who shall have signed the same addresses, shall likewise be suspend in the exercise of his attributes, notice being previously given to whom it belongs to appoint another to act in his place until the former shall have vindicated himself agreeably to the laws.

ART. 3. Should any curate be thus implicated, notice shall be given to the respective ecclesiastical judge to suspend him in his functions, and appoint a coadjutor or substitute, whose virtues are publicly known, to discharge his sacerdotal duties.

ART. 4. Every professor of science, acting by legal authority, who shall have signed the aforesaid memorials, shall be suspended in the exercise of his profession within the state.

ART. 5. The provision of the foregoing articles shall in nowise impede the process that shall be instituted, according to law, against all persons comprised therein.

ART. 6. Others, who shall have signed the aforesaid documents,

shall not hold the ayuntamiental offices, which in virtue of the provision of article 1, it should be necessary to refill; neither shall they exercise a vote in the elections that offer for that object. This measure shall in nowise impede the process that shall be instituted against them should they have deserved it by a more censurable conduct in the affair.

For its fulfilment, the vice governor of the state, pro tem. shall cause it to be published and circulated.

Given in Saltillo, on the 11th of March, 1826.

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## DECREE No. 23.

### *AMNESTY.*

The Congress of the state of Coahuila and Texas, desirous that the disagreeable occurrences that have caused so much convulsion in the state, threatening the public safety, should be entirely forgotten: occurrences which have compelled the high authorities, against their lenient and moderate principles, to adopt strong measures—and the said Congress witnessing with indescribable pleasure that the imperious circumstances which compelled them to devise all the means of justice in compliance with the first and most sacred of laws—and since obvious motives for the public welfare impel the said congress to exercise the most liberal clemency, which is the most noble attribute, and the most adorning prerogative of sovereignty, pursuant to all herein manifested, has thought proper to decree as follows:

ART. 1. The political events which compelled the high authorities of the state to dictate measures within the sphere of their attributes, and considered to be imperiously demanded for the preservation of the public order and tranquillity of the state, shall be entirely forgotten;—and in future, under no pretence, shall the said events ever be imputed to the authors thereof, in whatever manner implicated therein.

ART. 2. In pursuance thereof, all persons absent from their homes, destined to any part of the state by the executive in exercise of the extraordinary powers granted him by Decree No. 21, and against whom a process has been instituted in compliance with the said decree, shall be immediately set at liberty, and the executive shall direct that they be assisted out of the state treasury with an amount, which he shall judge sufficient, according to the distance and their rank, to enable them to return to the bosom of their families.

ART. 3. Those persons against whom judicial processes have, or should have been instituted, in compliance with Decree No. 22, and

the order of the 11th of March last, and who are consequently imprisoned or under arrest; and, being public functionaries, suspended from their stations, shall also be set at liberty, and the latter restored to the full exercise of their respective functions.

ART. 4. In future, neither the like pardon nor any other grace shall be extended to those who shall, directly or indirectly, promote anarchy attacking, under any pretence, the high authorities of the state; on the contrary, they shall be judged and punished with all the rigor and severity of the laws; as shall be done forthwith with respect to those who shall disdain the most ample and liberal amnesty granted by this decree, proceeding in their cases in strict conformity with the said laws, and with all the promptitude and energy required by the tenor thereof, to which the governor shall carefully attend.

ART. 5. Pursuant to the provision of the foregoing articles, the Decree No. 42 is hereby repealed; and since the difficult and delicate circumstances, which gave rise to the extraordinary powers granted the executive by Decree No. 21, have happily so far changed that the said powers are considered to be no longer necessary for the preservation of the public order and tranquillity, for which object they were granted, the aforesaid Decree No. 21 is likewise revoked.

For the fulfilment thereof, the governor of the state *pro tem.* shall cause it to be printed, published, and circulated.

Given in Saltillo, on the 27th March, 1826.

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#### DECREE No. 24.

#### *Convocation Law for the election of Representatives to the General Congress.*

The Congress of the state of Coahuila and Texas, authorised by article 9th of the constitution of the republic to determine, agreeably thereto, the qualifications of the electors, and to regulate the election of representatives to the general congress, to be holden, agreeably to the said constitution, on the first Sunday of October next—and as the shortness of the time does not permit the same to be performed in the manner prescribed in the first part of the constitution of the state, already presented by the committee appointed to model the same, because it has not yet been sanctioned—neither is it possible at the moment to do away the difficulties connected with the first establishment thereof in a new form of government—and besides, on the other hand, it will be easy to follow the method of former elections, with which the people are practically acquainted—said congress has thought

proper to decree, that, for this time only, the elections be holden agreeably to the following

### *LAW OF CONVOCATION:*

#### **JUNTAS IN GENERAL.**

ART. 1. For the election of deputies, primary and secondary juntas, and a general state junta, shall be holden.

ART. 2. On Sunday the 25th of August next, the president of each ayuntamiento of the state shall, by edict, or as the custom may be, convoke the citizens of the district to assemble at the primary juntas.

ART. 3. The said meetings, and the others, shall be preceded by public prayer in all the parish churches of the state, for which object seasonable notice shall be given to whom it belongs.

#### **PRIMARY MUNICIPAL JUNTAS.**

ART. 4. Primary juntas shall be composed of all lawful citizens, domiciliated and residing within the limits of the respective ayuntamientos.

ART. 5. All freemen, born within the limits of the republic of Mexico—all those who, domiciliated therein, have acquired this and other rights by the treaties of Iguala and Cordova—those who have acquired letters of citizenship, provided they combine the conditions required by this law, shall have the right of suffrage in popular juntas.

ART. 6. Those who have been sentenced to corporal or disgraceful punishment, shall not have the right of suffrage, unless reinstated by law in said right.

ART. 7. The right of suffrage shall be suspended, on the corresponding judicial testimony, in case of moral and physical inability—of minors, but married men of any age shall have the said right—in case of debt to the public funds, due, and payment having been demanded—and in case of not having a domicil, employment, trade, or known way of support—also of those under criminal prosecution.

ART. 8. Primary meetings shall be holden in all towns, whose population amounts to five hundred souls; and, in those which have no ayuntamiento, the regidor, whom the ayuntamiento of the chief town of the same district shall appoint, shall preside.

ART. 9. Towns not containing five hundred inhabitants, also haciendas and ranchos, whatever be the population thereof, in elections, shall appertain to the nearest junta.

ART. 10. The ayuntamientos, for assistance in keeping the census of the municipalities, shall avail themselves of the parish lists.

ART. 11. All towns, in order to facilitate the elections, whether those made by themselves or in connection with their district, shall be divided into such number of sections as the ayuntamientos shall con-

sider sufficient. At the junta of each, the number of electors corresponding to the respective population thereof, shall be chosen.

ART. 12. The choice of electors in the sections can devolve on citizens of every section.

ART. 13. Should a citizen be chosen in two or more sections, the election of that wherein he resides shall be preferred: and for the other sections, the citizens who shall have the next highest number of votes shall be elected.

ART. 14. Should a citizen, chosen elector, not be a resident in any of the sections by which he was chosen, the election of that wherein he received the most votes shall avail.

ART. 15. The primary juntas shall be holden on Sunday, the 27th of the aforementioned month of August.

ART. 16. They shall be presided by the president of the respective ayuntamientos—and should the town be divided into sections, the junta of one shall be presided by the said president, and the rest by the other alcaldes and regidores, according to the order of their appointment.

ART. 17. The citizens having convened in the most public place on the day appointed, shall choose a secretary and two tellers, who can read and write, from among those present.

ART. 18. The meeting being thus installed, the president shall ask whether any one has any complaint to make with regard to bribery or subornation to cause the election of any particular person, and should there be such complaint, the case shall be verbally and publicly investigated instanter. Should the charge be substantiated the offender shall be deprived of a voice, active and passive; false accusers shall suffer the same penalty, and from this decision there shall be no appeal.

ART. 19. Should doubts arise whether any person possesses the qualifications required for voting, the junta shall decide instanter, and the decision shall be obeyed without appeal for this time only; it being understood the doubt can have no relation to the provision of this or any other law.

ART. 20. The president shall abstain from making any indication that the election may result in favor of any particular person.

ART. 21. The junta shall proceed to make choice of primary electors, choosing one for every hundred voters, or for every five hundred souls.

ART. 22. Should the census give a moiety over and above the basis aforesaid, another elector shall be chosen; but should the excess not amount to a moiety, it shall not be regarded.

ART. 23. Each voter shall approach the table and specify such number of persons for electors as it belongs to that junta to choose. The secretary shall write the names of the said persons in his presence and no person shall be allowed to vote for himself in this or the other elections, under the penalty of losing his right for the time being.

ART. 24. Should the voter produce a list of persons for whom he

intends to vote, the secretary shall read to him the same, and ask him if it be in conformity with what is expressed therein, and if not, it shall be corrected.

ART. 25. The votes having been given in, the president, tellers, and secretary shall examine the lists, and the president shall declare in an audible voice the names of the persons elected, who shall be those who shall have received the greatest number of votes; in case of a tie, it shall be decided by lot.

ART. 26. The secretary shall commit the act to writing, and shall sign the same together with the president and tellers; a copy signed by the same persons, shall be delivered to each person chosen, to serve as a proof of his election.

ART. 27. To be eligible as an elector it is required to be a lawful citizen, over twenty-five years of age, or twenty-one if married, domiciliated and a resident in the municipality; not to hold any office of controversy, civil, ecclesiastical or military, or the office of curate.

ART. 28. Officers chosen by the people, as alcaldes, are not included in the foregoing article.

ART. 29. No person can decline the office of elector from any cause, or on any pretext whatever.

ART. 30. At the juntas no person shall appear armed, neither shall there be any guard.

ART. 31. The election having closed, the junta shall be immediately dissolved, and any other act in which they interfere, shall be null.

#### SECONDARY OR DISTRICT JUNTAS.

ART. 32. Secondary or district juntas shall be composed of primary electors, assembled in the chief towns of the district to choose electors who are to elect the representatives in this capital. The department of Texas for this object shall be considered as one sole district, whose chief town or capital shall be that of the department, being the city of Bexar.

ART. 33. The secondary juntas shall be holden on Sunday, the 10th of September next.

ART. 34. One secondary shall be elected for every twenty primary electors that shall be chosen in all towns of the district.

ART. 35. Should there be a moiety over and above twenty primary electors, another secondary shall be chosen; but should the excess not amount to a moiety it shall not be regarded.

ART. 36. Should any town of the district not have furnished twenty primary electors, a secondary shall be chosen notwithstanding.

ART. 37. At the secondary juntas the president of the capital of the district shall preside, to whom the primary electors shall present themselves with the document proving their election, that their names may be set down in the book in which the acts of the juntas are to be written.

ART. 38. Three days previous to the elections the electors shall

meet the president at the place he may appoint, and they shall choose a secretary and two tellers from among themselves.

ART. 39. They shall then present their certificates of election to be examined by the secretary and tellers, who on the day following, shall inform whether the same be according to law. Those of the secretary and tellers shall be examined by three individuals of the junta, chosen by the same by majority of votes, who shall inform in like manner and at the same time.

ART. 40. On the day aforesaid, the electors having assembled, the reports upon the certificates shall be read, and should any question arise with regard to the qualifications required, the junta shall resolve instantly, and the decision shall be obeyed without appeal.

ART. 41. On the day and hour appointed for the election the electors shall again convene, and, taking their seats without distinction, the secretary shall read the articles signed by the secondary juntas, and the president shall make the inquiry contained in article 18, the provision whereof shall be obeyed.

ART. 42. The primary electors shall immediately choose the secondary, one by one, by private ballot.

ART. 43. The votes having been given in, the president, secretary, and tellers shall examine the same; the person having more than one half the votes shall be elected, and the president shall declare each election. Should no one receive the absolute majority of votes, the two having the highest number shall be run in a second balloting, and the one who receives the majority shall be elected. In case of a tie it shall be determined by lot.

ART. 44. To be eligible as an elector it shall be required to be a lawful citizen, over twenty-five years of age, having a domicile and residence of one year in the district—to hold no office of controversy, civil, ecclesiastical or military, or the office of curate in the district. The election can devolve on individuals of the junta, or others, provided they belong to the state, laymen or of the secular order; a person shall be considered a resident in the district who continues his domicile therein, and is himself in another; provided he can join the general junta in the capital.

ART. 45. The time of residence, as provided in the preceding article, shall not be required of the military.

ART. 46. The secretary shall commit the act to writing, and, together with the president and tellers, sign the same; a copy thereof, signed by the same persons, shall be given to each elector to serve as a certificate of his election; the president shall transmit a copy likewise authenticated to the governor, and in his default to the vice governor of the state, by whom it shall be published by ordinance posted in the most public places.

ART. 47. The provision made for the primary elections in articles 20, 28, 29, 30 and 31, shall also be observed in the secondary.



## STATE JUNTA.

ART. 48. The general junta of the state shall be composed of the secondary electors of all the districts, assembled in this capital for the purpose of electing deputies to the chamber of representatives in the general congress.

ART. 49. The said junta shall be holden on the first Sunday in October next, in conformity to article 16th of the constitution of the republic.

ART. 50. The governor of the state shall preside the same, and in his default the vice governor, to whom the electors shall present themselves with their credentials, that their names may be written down in a book, wherein the acts of the junta shall be committed to writing.

ART. 51. Three days previous to the election, the electors shall meet with the governor or vice governor, as the case may be, at the place appointed, with open doors, and they shall appoint, by majority of vote, a secretary and two tellers from among themselves.

ART. 52. This decree, the credentials, also the authenticated record of the acts and the elections holden in the chief towns of the districts, shall be read; the secretary and tellers shall examine the same, and report on the day following whether the whole be according to law—the credentials of the latter shall be examined by three individuals of the junta, chosen by majority of votes, who shall report in like manner and on the same day.

ART. 53. The electors having assembled on the day aforesaid, the reports shall be read, and should any doubt appear upon the credentials or certificates, or the qualifications of the electors, the junta shall decide instantly, and the resolution shall be obeyed without appeal.

ART. 54. On the day appointed for the election, the electors having assembled and seated themselves without distinction, with open doors, the president shall make the inquiry as specified in article 18, the entire provision whereof shall be obeyed.

ART. 55. The electors shall then choose the deputy by ballot.

ART. 56. The votes having been given in, the president, secretary and tellers shall examine the same, and the person receiving the absolute majority shall be declared elected; should no one receive such majority, the two having the highest number shall be elected. Should there be a tie, it shall be decided by lot.

ART. 57. After the election of deputy proprietor, the deputy suppletory shall be elected in the same manner.

ART. 58. In conformity to articles 11, 12, and 13 of the constitution of the republic, it belongs to the state to elect one deputy proprietor and one suppletory.

ART. 59. The said deputies shall possess the qualifications required by articles 19, 20, and 21 of the constitution aforesaid, and those excepted by article 23 therein, cannot be elected.

ART. 60. The secretary shall commit the act of the elections to

writing, and, together with the president and the electors, sign the same; and the president shall cause a list of the deputies elected, signed by himself and the secretary, to be published, and shall transmit a copy to each of the towns of the state.

ART. 61. The election of the aforementioned deputies having closed, the junta shall make the proper arrangements for complying with the provisions of article 17 of the constitution of the republic.

ART. 62. In the state junta, the articles 20, 28, 29, 30, and 31 shall be obeyed.

For its fulfilment, the vice governor of the state *ad interim* shall cause it to be published and circulated.

Given in Saltillo, on the 28th of July, 1826.

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### DECREE No. 25.

The Congress of the state of Coahuila and Texas, in compliance with the general law of August 24, and in exercise of the power granted thereby to the same for replacing the companies of permanent Cavalry which ought to exist in the state, decrees:

ART. 1. The governor of the state shall demand of the chief political officers, and the latter of their immediate subordinates, the number required to complete the necessary force of the fortress companies of permanent cavalry, destined to the defence of the state, according to the general law of March last.

ART. 2. The executive, and each of the said chief officers in their turn, shall make an allotment of the aforementioned number among the respective districts in proportion to the population, manifesting to their subordinates the obligation and responsibility they are under of showing that the allotments are filled within the time specified, and taking care that in the same as little injury as possible shall be occasioned to agriculture, mining, and the arts.

ART. 3. In order to comply with the provision of article 7 of the aforementioned law of the 24th of August, the number of recruits to be enrolled in order to fulfil the future basis of the said fortress companies, shall be repeated in the terms therein specified.

ART. 4. The ayuntamientos, with the assistance of armed force should it be necessary, shall proceed to make levies, and to take from among the same the individuals required to complete the number assigned.

ART. 5. The levies having been made, vagrants and disorderly persons shall be taken in preference for military service: and should the number designated not be completed with persons of this description, unmarried men, who can be spared by their families with the least inconvenience, shall be taken, *and the latter shall draw lots to complete the number required.*

ART. 6. In each municipality there shall be a junta, composed of

the first *alcalde*, two *regidores*, and one *sindico*, to investigate and determine the circumstances and qualifications of those comprised in the foregoing articles, according to the ordinances and existing laws.

ART. 7. Should any individual claim to be aggrieved by the decision of the *junta* aforesaid, he shall appeal to the governor of the state, who shall give the final decision, but, during the interval, the appellant shall comply with a soldier's duties.

ART. 8. Should the claim of the appellant prove to be just, he shall be exempt from military service for that time only, should the impediment not be perpetual, his post being filled by another of the same place. For the expense incurred in the support of the aggrieved party, also for that he incurs in the appeal, the *junta* of investigation shall be responsible.

ART. 9. The general military commandant may direct, agreeably to the ordinance, that recruits be obtained by entrapment and decoy, and that those who present themselves voluntarily be admitted—raising flags in such places as the governor of the state shall designate. In this case those commissioned by the aforementioned chief, for the purpose, shall give notice to the respective *ayuntamientos* of the number and names of the persons raised in this manner, that they may be deducted from the number designated.

ART. 10. Should hired servants appear in the lists presented to the *ayuntamientos* by the persons commissioned in compliance with the provision of the preceding article, they shall not be considered as having presented themselves voluntarily to the military service, unless the amount they owe be previously paid, or there be an agreement between the servant and the master, or between the latter and the person commissioned.

ART. 11. From the second class, specified in article 5, those shall be enrolled who are destined to the depot specified in article 7 of the general law on the subject, also by lot as in the former instance; provided there be not a sufficient number of the class specified in article 5 aforesaid, to fill the vacant posts.

ART. 12. Those who volunteer as substitutes, and those taken in levy according to the second part of article 5 aforesaid, shall be admitted, should it be satisfactory to the *junta* of investigation; but one or more instances of the kind shall not exempt them from military service when, on another occasion, it shall belong to them to offer themselves.

ART. 13. Those belonging to the civic militia shall, for that reason alone, be exempt from the said service.

ART. 14. The governor shall previously agree with the executive of the republic, that the latter may furnish him with the funds required to satisfy the daily pay and expenses of the recruits.

ART. 15. That this law be more easily fulfilled, the executive shall give to the subordinate officers all the instructions he shall deem necessary.

For its fulfilment, the vice governor of the state, ad interim, shall cause it to be printed, published and circulated.

Given in Saltillo, on the 29th of April, 1826.

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DECREE No. 26.

The Congress of the state of Coahuila and Texas has thought proper to decree the following:

Until the manner and terms whereby the councillors at law of the state are to be admitted and qualified, the executive shall permit those who apply to him to exercise their profession, exacting of them their lawful diploma, and authenticated certificate that they are not suspended in the practice of their profession.

The vice governor of the state, ad interim, shall order the same to be printed, published, and circulated, for its fulfilment.

Given in Saltillo, on the 14th of October, 1826.

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DECREE No. 27.

The Congress of the state of Coahuila and Texas, taking into consideration that according to the constitution of the state, about to govern, the municipalities ought very soon to be elected, and with a view to prevent the inconvenience and injury that might result to the towns from a repetition of electoral juntas, and other acts relating thereto, has thought proper to decree:

The present ayuntamientos shall, for this time only, continue in the exercised of their functions until removed according to the plan that shall originate in the constitution of the state.

For the fulfilment thereof, the vice governor of the state, pro tem., shall cause the same to be printed, published, and circulated.

Given in Saltillo, on the 28th of November, 1826.

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DECREE No. 28.

With a view to comply in some manner with the desires of the governor on the subject of promoting the more ready despatch of the business of the towns, and considering that the election of the council and other officers, according to the constitution, is about to take place, the Congress of the state of Coahuila and Texas has resolved to decree as follows:

ART. 1. The executive council, established by Decree No. 19, shall be composed for the present of two voters proprietors, who are

present in the state, and one supletory, and shall be chosen by congress.

ART. 2. In all other respects the Decree No. 19 shall continue in force, and the councils conforming to the same.

ART. 3. In case of moral or physical inability on the part of any voter proprietor, the supletory shall act in his place.

For its fulfilment, the governor of the state, ad interim, shall cause it to be printed, published, and circulated.

Given in Saltillo, on the 16th of February, 1827.

### DECREE No. 29.

*Form of Oath to be taken by the Officers of the State to obey the Constitution of the same, and the manner said Constitution is to be delivered to the Executive to be solemnly published.*

The Congress of the state of Coahuila and Texas, having sanctioned the political constitution of said state, and desiring that the oath and publication thereof be effected with the pomp and solemnity corresponding to an event so fortunate, and so much desired, has thought proper to decree:

ART. 1. On the 11th instant, in public session, to commence at 10 o'clock in the morning, the aforementioned constitution shall be read entire; all the deputies present in the capital shall then sign two first copies in manuscript, and a committee of three individuals, including the secretary of congress, shall receive one of the said first copies from the hands of the president, and shall pass to present the same to the governor of the state, that he may preserve the same in his archives.

ART. 2. On the 12th, in public session, to commence at 10 o'clock, A. M., one of the secretaries holding the political constitution of the state in his hands; first, the president shall take oath to cause the same to be obeyed; and afterwards the other deputies, in the hands of the president. The governor and council shall then present themselves in the hall of sessions, and take the same oath, in the hands of the president; and this act having closed, they shall proceed, accompanied by the deputies and officers, to the parish church, where a solemn Te Deum shall be chaunted in act of gratitude to the Supreme Being.

ART. 3. The secretary of state, the ayuntamientos, ecclesiastical officers, superiors of offices for transacting public business, and the prelate of the religious fraternity of San Francisco, shall take oath before the governor to obey the constitution. The officers in national employ, for the present, and until the general congress shall resolve whether they should, shall take oath in the same manner, to obey the said constitution, and cause their subordinates to obey the same.— Those belonging to a religious communion, before their respective

prelate; and the subordinates, the other officers employed by other authorities, corporations, and business offices, shall take the same oath before their superiors; all on the day the governor shall appoint.

ART. 4. The governor shall designate the day for the solemn publication of the constitution in this capital, which being done, he shall communicate the same immediately to the chief of the department of Texas, and to the first alcaldes of the other ayuntamientos of the state, that they may proceed to publish the same in the towns of their district. The governor shall regulate the ceremony for the publication thereof in this capital, taking care that the same be conducted with due dignity; and he shall also take the proper measures that the said constitution be likewise solemnly published in all the other towns of the state.

ART. 5. In the Department of Texas, and in the other towns apart from the capital, the chief of police, and first alcaldes of each ayuntamiento, shall take the said oath before the ayuntamiento of this capital, and afterwards the other members of the respective corporations before the said chief, or respective alcaldes; also curates, and state agents or superior officers having charge of the administration of the rents in their districts; and also those who are present in the said towns and departments, and in employ of the general government, shall take the same oath as prescribed in article 3.

ART. 6. In this capital, and in the other towns of the state, the people and the rest of the clergy shall take the same oath in their respective parishes, in the accustomed form, and on the day their ayuntamientos shall appoint.

ART. 7. The corresponding act of all these acts shall be committed to writing, and two attested copies shall be taken out and transmitted, by whom it belongs, to the governor of the state, who shall deposit one in the archives of his secretary's office, and pass the other to congress with the same object.

ART. 8. The form of the oath, mentioned in the third and following articles, shall be as follows:

You solemnly swear, before God, to obey the political constitution of the state of Coahuila and Texas, sanctioned by congress on the 11th of March, 1827, and cause the same to be obeyed. (They shall answer yes, I do swear.) So help you god; should you not, may it be demanded of you in judgment, and moreover you shall be answerable to the state. (With respect to the people, and others not holding office, the words "*and cause the same to be obeyed*" shall be omitted.)

ART. 9. Any individual or individuals, comprised in the articles of this decree, who shall, directly or indirectly, refuse to take the oath, shall be rejected by the state, should they, on being once required by the executive or competent authority, persist in their purpose.

For its fulfilment, the governor of the state, ad interim, shall cause it to be printed, published and circulated.

Given in Saltillo, on the 6th of March, 1827.

The constitution of the state sanctioned on the eleventh of March, 1827.

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DECREE No. 30.

The Congress of the state of Coahuila and Texas has thought proper to decree the following:

For printing and publishing the constitution, sanctioned and ordered to be published and circulated, the governor shall use the following form:

The governor, *pro tem.*, of the state of Coahuila and Texas, to all the inhabitants thereof: Be it known that the congress of the said state has decreed and sanctioned the following constitution: (the constitution with the preliminary and signatures thereof to be here inserted.) Wherefore, I command it to be printed, published, circulated, and duly fulfilled.

Given, &c. To be here signed by the governor, and then by the secretary.

For its fulfilment, the governor of the state, ad interim, shall cause it to be printed, published and circulated.

Given in Saltillo, on the 11th of March, 1827.

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DECREE No. 31.

*Convocation for the first Constitutional Congress.*

The Constituent Congress of the state of Coahuila and Texas, taking into view that should the election of deputies to the first congress, of governor, vice governor, and councillors, be effected within the time the constitution of the state prescribes, the former cannot take place until the months of August and September; neither can the latter officers exercise their functions until January and March, 1828; and desiring as far as possible to avoid the perplexities, which would obviously occasion great injury to the state, and internal administration thereof, has thought proper to decree: that, for this time only, the elections be holden, congress installed, and the governor, vice governor, and councillors, enter on the exercise of their functions in the manner stated in the following law of convocation.

**CONVOCATION LAW.**

*Section First.*

CONGRESS.

ART. 1. Congress shall be the union of the deputies, representing the state, elected in the manner hereinafter provided, and until 1832 the number thereof shall consist of twelve proprietors and six suppletories.

**ART. 2.** Congress shall open their sessions on the 1st of July, and with this object, and that of the solemn installation thereof, the deputies shall be present in the capital by the 27th of June.

**ART. 3.** The districts of Saltillo, Parras, and Mónicova, shall elect three deputies proprietors each, that of Texas two, and Rio Grande one. The district of Saltillo shall elect two, and each of the other districts one deputy supletory.

**ART. 4.** To be eligible to the office of deputy proprietor or supletory, the following qualifications at the time of the election shall be required:

First—To be a citizen in the enjoyment of his rights.

Second—To have attained the age of twenty-five years.

Third—To be domiciliated in the state, and to have resided therein the two years immediately preceding their election. For natives of the state the first two requisites shall be sufficient.

**ART. 5.** Those not born within the territory of the republic to be eligible as deputies proprietors, shall have been eight years domiciliated therein, and shall possess real estate to the amount of eight thousand dollars, or an industrious employment that shall yield them one thousand dollars per annum, and the qualifications provided in the foregoing article.

**ART. 6.** Natives of any other part of the American continent, in 1810 subject to Spain, and not now annexed to any other nation, nor in subjection to the former, shall be excepted from the foregoing article; and for such, three years domicil in this republic, and the requisites prescribed in article 4, shall be sufficient.

**ART. 7.** The following persons cannot be deputies proprietors or supletories:

First—The governor and vice-governor of the state, and members of the executive council.

Second—Persons in employ of the general government.

Third—Civil functionaries whose offices are conferred by the executive of the state.

Fourth—Ecclesiastics exercising any jurisdiction or authority in the district where the election is holden.

Fifth—Foreigners in time of war between their own country and this republic.

**ART. 8.** The public officers of the general government, and of the state, to be eligible as deputies, shall be required to have been out of office four months previous to the election.

**ART. 9.** The deputies of the present congress cannot be elected.

### *Section Second.*

#### GOVERNOR, VICE GOVERNOR AND COUNCILLORS.

**ART. 10.** The governor of the state shall possess the following qualifications at the time of his election.

First—He shall be a citizen in the enjoyment of his rights.



Second—A native of this republic.

Third—Shall have attained to thirty years of age.

Fourth—Shall be domiciliated in this state, having resided five years therein, two of which shall be immediately preceding his election.

ART. 11. Ecclesiastics, military, and other officers of the general government, in actual service, cannot obtain the office of governor.

ART. 12. There shall be likewise a vice-governor of the state, whose qualifications shall be the same as those required for governor.

ART. 13. For the better discharge of his official duties, the governor shall have a body for consultation, to consist of three voters proprietors and two supletories, of all whom one only can be an ecclesiastic.

ART. 14. The qualifications required for a councillor shall be the same as those required for a deputy. Those not eligible to the office of deputy shall not be eligible to that of councillor.

ART. 15. Those elected to these offices shall take possession of the same on the 1st of August, and cannot decline the service thereof, except the deputies of congress at the time of the election, and those who, in the opinion of the said congress, are morally or physically disabled.

### *Section Third.*

#### **ELECTION OF DEPUTIES.**

ART. 16. For the election of deputies, municipal electoral, and district electoral assemblies shall be holden.

#### *Municipal Electoral Assemblies.*

ART. 17. The municipal electoral assemblies shall be composed of citizens enjoying their rights, domiciliated and resident within the limits of the respective ayuntamiento. No person of this class can decline attending the same.

ART. 18. Said assemblies shall be holden on Sunday the 22d of April, and day following, to choose district electors, who are to elect the deputies. For this purpose, eight days previous, or less, should the pressure of the time require, the president of each ayuntamiento shall convoke the citizens of his district by the proper edict, or as the custom may be, giving notice to the haciendas and ranchos of the same district, that the same may come to the knowledge of the citizens thereof.

ART. 19. That the citizens may more conveniently attend, each ayuntamiento, according to the locality of its territory, shall determine the number of municipal meetings to be formed in its limits: also the public places where they shall be holden, designating to each the places corresponding thereto.

ART. 20. They shall be presided, one by the chief of police, or the

alcalde, and the rest by the other individuals of the ayuntamiento, as it shall fall to them by lot; and in default of the latter, the said corporation shall appoint for president of the said municipal assembly, a citizen belonging within the precincts assigned thereto, who can read and write.

ART. 21. On the aforesaid Sunday in April, the hour of the meeting having arrived, and the citizens assembled in the place appointed, being together, the said assembly shall commence by choosing from among themselves, by majority of vote, one secretary and two tellers, who can also read and write.

ART. 22. The elections shall continue open on both days specified in article 18, four hours each, divided in morning and evening. In each meeting a register shall be kept to record therein the votes of the citizens convened to choose the district electors, entering alphabetically the names of the voters and candidates.

ART. 23. To be eligible as an elector it shall be required to be a citizen in the enjoyment of his rights—to have attained the age of twenty-five years—to be able to read and write—and to be domiciliated, and a resident in the same district one year immediately preceding the election.

ART. 24. Each citizen shall vote for the respective district electors, viva voce, or in writing; in the former case, the voter shall call the names of those for whom he votes in an audible voice, and should he give in his vote in writing, the secretary shall read the list thereof in the same manner, and shall enter the same in presence of the voter. No person shall vote for himself, in this or the other electoral acts, under penalty of losing his right of voting.

ART. 25. In the district in which one deputy only is to be elected, there shall be chosen eleven electors, and where two or more deputies are to be elected, there shall be chosen twenty-one electors.

ART. 26. Doubts or controversies that occur whether any person, or persons, possess the qualifications required for voting, shall be determined verbally by the assembly, and the decision shall be executed without appeal for that time and that purpose only: it being understood that the doubt shall not turn upon the provision of this or other laws. Should there be a tie in determining the question, absolute sentence shall be given.

ART. 27. Should complaints arise of bribery, subornation, or force, to cause the election to result in favor of particular persons, the case shall be publicly and verbally canvassed and brought to a decision. Should the accusation be founded in fact, the offenders shall be deprived of a voice, active and passive. False accusers shall suffer the same penalty. From this decision there shall be no appeal. Doubts that occur with regard to the nature of the testimony, shall be determined in the manner stated in the preceding article.

ART. 28. Municipal assemblies shall be conducted with open doors, without any guard; and no person, to whatever class he may belong, shall appear armed therein.

**ART. 29.** The election of both days having terminated, the president, tellers and secretary of each assembly, shall proceed to estimate and cast up the votes received by the several candidates in the register, and sign the same; which having been done, the assembly shall be dissolved, and any other act in which they interfere, shall not only be null, but shall be considered an offence against the public safety. The said register shall be delivered, enclosed and locked, to the secretary of the respective ayuntamiento.

**ART. 30.** On Sunday, the 29th of April, aforesaid, each ayuntamiento shall convene in their respective town halls in public session. In their presence, the president, tellers, and secretary of the municipal assemblies being also present, the register shall be opened, and, in view of all present, a general list shall be formed alphabetically, comprising all the candidates, and number of votes they have received.

**ART. 31.** The said list, and the act of the corporation that shall be drawn up relative to the subject, shall be signed by the president of the ayuntamiento, and secretary of the same, and the secretaries of the assemblies. Two copies of the aforesaid list shall then be drawn off, authenticated by the same persons, one of which shall be immediately posted in the most public place, and the other delivered with the corresponding official letter, signed by the president of the ayuntamiento, to two individuals whom the said corporation shall appoint from its own body, who shall repair to join those commissioned by the other ayuntamientos in order to make the general adjustment and computation of the votes.

**ART. 32.** On Sunday, the 13th of May, the persons commissioned by the ayuntamientos shall present themselves, with their certificates of appointment, to the chief of police, and in his default, to the first alcalde of the capital of the district; and the latter, or second alcalde, as the case may be, presiding, they shall meet in the town halls in public session, and in view of all the lists, shall form a general list of the persons chosen district electors by the citizens of the respective district, stating the number of votes they have received, and the places of their residences.

**ART. 33.** In order to make the general computation of votes, four persons commissioned, at least, shall be present. In districts wherein this number cannot meet, the ayuntamiento of the capital town shall choose from their own body the persons wanting to complete the same.

**ART. 34.** The citizens who, on this general inquiry, shall prove to have the greatest number of votes in the list, shall be constitutionally chosen electors. In case of a tie between two or more persons, it shall be decided by lot.

**ART. 35.** The list aforesaid, and act relative to the subject, shall be signed by the president, commissioners, and the secretary of the ayuntamiento of the capital of the district. Copies of both shall be drawn off, authenticated by the same persons, and transmitted by the president to the permanent deputation of congress, to the governor of the state, and to the ayuntamientos within the precincts of the district.

ART. 36. The said president shall transmit forthwith the corresponding official letter to the electors chosen, in order that they may meet in the capital of the district on a day hereinafter specified for the purpose of holding the electoral assembly of the same.

*Paragraph Second.*

*District Electoral Assemblies.*

ART. 37. The district electoral assemblies shall be composed of the electors chosen by the citizens in the municipal assemblies, who shall meet in the capital of the respective district, to choose the deputy or deputies, corresponding thereto, to meet in congress as representatives of the state.

ART. 38. Said assemblies shall be holden fifteen days from and after the general computation of votes as specified in article 32—the electors convening in the town halls or in the building considered most appropriate for so solemn an act, with open doors, and without any guard. No person, to whatever class he may belong, shall present himself armed in said assemblies.

ART. 39. They shall be presided by the chief of police, and in his default, by the first alcalde of the capital of the district; commencing their sessions by choosing, by majority of vote, from their own body one secretary and two tellers; the president shall then cause the credentials of the electors to be read, which shall be the official letters wherein they were notified of their appointment.

ART. 40. The president shall then ask if there be any legal nullity on the part of any elector for his being such, and if it be proved at the instant that there is, the electors shall lose the right of voting. The president shall then also ask if there has been bribery, subornation, or force for the election to result in favor of a particular person—and should it be immediately proved that there has, the delinquents shall be deprived of a voice active and passive, and false accusers shall suffer the same penalty. Doubts that occur, in either case, shall be determined by the assembly in the manner specified in article 26.

ART. 41. Immediately afterwards, the electors present shall proceed to make choice of the deputies corresponding to the district, and the same shall be elected one by one by ballot. Each elector shall drop his vote in an urn placed upon a table at the foot of a crucifix, after having made oath before the crucifix, the president holding the same in his hands, that in voting for deputies to congress, he will give his vote to citizens possessing, in his opinion, the qualifications of integrity, sound information, and a well known steady attachment to the national independence.

ART. 42. The votes having been given in, the president, tellers, and secretary shall count the same, and the citizen who has received more than one half the number of votes shall be constitutionally elected deputy. The president shall declare each election. Should no one

have received the absolute majority, the two who have obtained the greatest number shall be run in a second balloting. Should those receiving a like respective majority be more than two persons, they shall all be run in the second balloting, and the same shall be done when no one receives this majority, but all an equal number of votes. In all these cases, the candidate who receives the majority of votes shall be elected, and should there be a tie, the balloting shall be repeated once only; and should there again be a tie, it shall be determined by lot.

ART. 43. Should one individual only receive the respective majority, and two or more persons an equal number of votes, but greater than that of all the others, to decide which of the latter shall run in a second balloting with the former, there shall be a separate balloting between them, and the one who receives a majority shall enter in competition with the person who received the respective majority. In the event of a tie, the balloting shall be repeated; and should there again be a tie, it shall be decided by lot. In the second balloting between the person who received the respective majority over the whole and his rival, the provision contained in the last part of the preceding article shall be observed.

ART. 44. When one person only receives the respective majority, and all the others an equal number of votes, to determine which of the latter shall run in a second balloting with the former, the same shall be done with respect to those, between whom there is a tie, as provided for this object in the foregoing article: and also to determine which of the rival candidates shall be elected deputy, the provision of the last part of the same article shall be observed.

ART. 45. The election of deputies proprietors having closed, that of the supletories shall immediately follow in the same manner, and form; and the latter having also terminated, a list containing the names of all the deputies elected, signed by the secretary of the respective assembly, shall be immediately posted in the most public place. The president and all the electors shall sign the electoral act, and the former, the tellers, and the secretary shall transmit copies, authenticated by themselves, to the permanent deputation of congress, to the governor of the state, and to all the ayuntamientos of the district. Said assemblies having performed the acts prescribed in this law, shall immediately dissolve; any other act in which they interfere shall be null, and moreover reputed as an attempt against the public safety.

ART. 46. The president shall also seasonably despatch the corresponding official letter to the deputies, proprietors and supletories, accompanied by an attested copy of the act, to serve them as a credential of their election.

ART. 47. No citizen shall be allowed to excuse himself, in any way or under any pretext, from discharging the duties spoken of in the present section.

***Section Fourth.***

**ELECTION OF GOVERNOR, VICE GOVERNOR, AND COUNCILLORS.**

**ART. 48.** On the day following the election of deputies to congress, the district electoral assemblies, all and each one of the same, shall choose a governor, vice governor, three councillors proprietors and two supletories; and the said election shall be conducted in the manner prescribed by articles 41, 42, 43, and 44.

**ART. 49.** The aforesaid election having closed, a list of the names of those elected, and stations to which they are chosen, signed by the secretary of the respective assembly, shall be immediately posted in the most public place. The acts shall be signed by the president and the electors, and attested copies thereof, authenticated by the said president, secretary, and tellers, shall be transmitted, enclosed in a certified sheet, to the permanent deputation.

**ART. 50.** On the day the first ordinary sessions of congress are opened, the person who was president of the permanent deputation at the time, shall present the attested copies aforesaid, and after being read, congress shall appoint a committee from their own body to whom they shall be passed, in order that said committee may revise the same, and report thereon within the third day.

**ART. 51.** On the day aforesaid, congress shall proceed to determine the elections made by the districts, and compute the votes.

**ART. 52.** The individual who receives the absolute majority of votes of the district electoral assemblies, to be computed according to the whole number of voters composing the same, shall be governor, vice governor, or councillor, as the election under consideration may be.

**ART. 53.** Should no person have the majority aforesaid, congress shall elect for these offices one of the two or more individuals who have the greatest number of votes; and the same shall be done when no one has this respective majority all standing equal in votes.

**ART. 54.** Should one person only receive the respective majority, and two or more an equal number of votes, but greater than that of all the others, congress shall elect one person from among the former, who shall be run in competition for the election with the person who received the respective majority.

**ART. 55.** In the event of a tie, the balloting shall be repeated once only, and should there again be a tie, shall be determined by lot.

***Section Fifth.***

**COAHUILTECIANS AND CITIZENS (FREEMEN) OF COAHUILA AND TEXAS.**

**ART. 56.** The following shall be Coahuiltecians:

**1st.** All men born and domiciliated in the territory of the state, and the children of the same.

2d. All those born in any other part of the territory of this republic, who shall become domiciliated in the state.

3d. Foreigners, of whatever nation, legally established in the state at the present time.

4th. Foreigners who obtain from congress letters of citizenship, or who are or shall be domiciliated in the state according to the laws that shall be enacted, as soon as the general congress shall issue the general statute of naturalisation, which, agreeably to the 27th prerogative conferred on the said congress by the constitution, ought to be established.

ART. 57. The following shall be freemen of Coahuila and Texas:

1st. All men born in the state and domiciliated in any part of the territory thereof.

2d. All the citizens of the other states and territory of the republic as soon as they are domiciliated in the state.

3d. All sons of Mexican citizens, even should they be born out of Mexican territory, provided they become domiciliated in the state.

4th. Foreigners who, already enjoying the rights of Coahuilteixians, shall obtain special letters of citizenship from congress. The laws shall prescribe the qualifications and conditions for granting them the same.

ART. 58. Those born within the territory of the republic, and foreigners domiciliated therein (except minors) at the time the political liberties of the country were proclaimed, who did not remain faithful to the cause of its independence, but emigrated to a foreign country or dependency of Spain, shall be neither Coahuilteixians nor citizens of Coahuila and Texas.

ART. 59. The rights of citizenship shall be forfeited:

1st. By becoming naturalised in a foreign country.

2d. By accepting office, pension, or title from a foreign government without permission from congress.

3d. By receiving executory sentence wherein corporal or disgraceful punishment is imposed.

4th. By a person selling his vote, or buying that of another for himself or a third person, whether in popular assemblies, or in any other; and by violation of public trust in the said assemblies, whether by those who are presidents, or secretaries, or tellers, or those discharging any other public function.

5th. By having resided five years in succession without the territory of the republic, without a commission from the general government or that of the state, or without license from the latter.

ART. 60. A person who forfeits the rights of a citizen, cannot recover the same, unless reinstated therein by congress.

ART. 61. The exercise of the said rights shall be suspended:

1st. For moral or physical disability, after judicial investigation.

2d. For not having attained the age of twenty-one years, except married persons, who shall enjoy the said rights from the time they marry, whatever be their age.

3d. For being debtor to the public funds, the time of payment having expired, and payment having been demanded.

4th. For being under criminal prosecution, until the accused shall be acquitted, or sentenced to a punishment not corporal nor disgraceful.

5th. For having no employment, trade, or known way of support.

6th. For not being able to read or write; but this provision shall not take effect until after the year 1850, and with respect to those who shall enter on the exercise of the rights of citizens after that time.

ART. 62. Only for the causes specified in articles 59 and 61, shall the rights of a citizen be suspended.

ART. 63. None but citizens in the exercise of their rights, shall vote for officers of the state in cases designated by law, and such only shall be elected to the said offices and all others of the state.

ART. 64. That this decree may more easily become known, even in the smallest towns, and that the same may be strictly and promptly executed, the executive shall accompany therewith such instructions as he shall deem necessary.

For the fulfilment thereof, the vice governor of the state, *pro tem.* shall cause the same to be printed, published and circulated.

Given in Saltillo, on the 23d of March, 1827.

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No. 32.

INTERNAL REGULATIONS OF CONGRESS.

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DECREE No. 33.

*Change of the present Ayuntamientos agreeably to the Constitution of the State.*

The Congress of the state of Coahuila and Texas, in consideration of the arrangement made by decree No. 27, bearing date the 28th of November, 1826, and desiring that the present ayuntamientos be renewed in accordance with the constitution of said state, at the earliest possible period, has thought proper to decree:

ART. 1. On Sunday immediately following the publication of the constitution, meetings of the municipal electoral assemblies mentioned in article 161 of the constitution, shall, for this time, be called; and, on the first Sunday and second Monday following, the present ayuntamientos shall open their registers for the election of a new board.

ART. 2. In each of the assemblies aforesaid, three lists shall be formed: one for setting down the names of persons chosen for alcaldes, with their distinction of 1st, 2d, and 3d; another for regidores, and a third for syndicos: likewise in each observing the same distinction.

ART. 3. In towns that contain a population of one thousand souls,



but which have had an ayuntamiento until the present, and likewise in those containing in their limits from one to two thousand five hundred, there shall be one alcalde, two regidores, and one syndic; and in those containing from this number to five thousand, one alcalde, four regidores, and one syndic; and from this to ten thousand, two alcaldes, six regidores, and two syndics; from this to twenty thousand, three alcaldes, six regidores, and two syndics.

ART. 4. The two days of election, whereon the registers are to be kept open, having expired, the president, tellers, and secretary of each assembly shall count the votes received by each citizen in the lists, and after casting up the same, shall sign the lists, and deliver the same, enclosed under lock and key, to the secretary of the ayuntamiento.

ART. 5. On the Sunday next following the election aforesaid, the ayuntamiento shall convene in their town halls, the presidents, tellers, and secretaries of the assemblies also being present, and with all the lists before them, shall form three general lists, setting down in one, the names of all the persons who received votes for alcaldes, beginning with the one who received the most votes, and continuing in that manner; another, of those who received votes for regidores, in the same manner; and a third, of those for whom votes were given for syndics, in the same order.

ART. 6. Should a person at the same time receive votes for alcalde, regidor, and syndic, he shall be entered only on the list wherein he receives the most votes; should he in two or more lists receive an equal number, he shall accept the office of alcalde in preference to that of regidor, and the latter in preference to that of syndic.

ART. 7. The president of the ayuntamiento, and all the secretaries of the assemblies, shall sign the three lists aforesaid, and draw off two copies thereof; one of which, authenticated, shall be transmitted to the executive, and the other posted in the most public place. The original lists shall be lodged in the archives.

ART. 8. The president of the ayuntamiento shall give official notice of their election to those chosen to municipal officers, in accordance with article 165 of the constitution.

ART. 9. The ayuntamientos, for this time, shall be totally renewed, and members of the present board can be re-elected.

ART. 10. Those elected, unless physically impeded, cannot fail to take possession of office on the day appointed; they can afterwards manifest to the executive any reasons they think they have for not serving the same.

ART. 11. Those newly chosen shall take possession of office on the first day of festival after the Sunday specified in article five of this decree, and shall take the oath prescribed in article 220 of the constitution, before the president of the ayuntamiento that retires from office.

ART. 12. For the population specified in article 158 of the constitution, the election of commissaries and syndics shall be made by the

same assemblies, at the same time and in the same manner and form, as that of the ayuntamientos—their oath and possession of office shall be in accordance with the provision of the preceding articles. Persons only who reside in the respective towns shall be eligible to the aforesaid offices.

For its fulfilment, the governor of the state, pro tem., shall cause it to be printed, published and circulated.

Given in Saltillo, on the 14th of April, 1827.

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DECREE No. 34.

*Salary and Viaticum of the Deputies of the Constitutional Congress.*

The Constituent Congress of the state of Coahuila and Texas, has thought proper to decree:

ART. 1. The deputies to the congress of the state shall (each) receive out of the treasury of the latter, a monthly salary of one hundred dollars during the time of session.

ART. 2. For the journey to and from the capitol, computing from the place of their residence, they shall receive at the rate of ten rials for every league.

ART. 3. Their salary shall date from the time their credentials shall be approved by congress.

ART. 4. The deputies suppletories shall receive the same pay as the deputies proprietors.

For the fulfilment thereof, the governor of the state, pro tempore, shall cause the same to be printed, published and circulated.

Given in Saltillo, on the 19th of May, 1827.

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DECREE No. 35.

*Articles 46 and 47 of Decree No. 32, reformed.*

The Constituent Congress of the state of Coahuila and Texas, in order that the internal regulations to be used by the Constitutional Congress may be rendered in conformity to the constitution of said state, has thought proper to reform the articles 46 and 47 in the following manner:

ART. 46. The session shall open at ten o'clock A. M., and five deputies present, shall constitute a quorum for the object aforesaid, for reading the act, and for the first and second reading of propositions and reports; and six shall be sufficient for communicating the correspondence and substantiating expedients that newly offer, and generally to discuss any project or scheme; but to declare that a vote can be taken, and other resolutions adopted, not here expressed, the concurrence of the absolute majority shall be expressly required.

ART. 47. For deliberating upon subjects, in the judgment of con-

gress of very great and serious importance, and upon all projects of law or decree, two-thirds of the members shall be required.

For its fulfilment, the governor of the state, *pro tem.* shall cause it to be printed, published and circulated.

Given in Saltillo, on the 19th of May, 1827.

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DECREE No. 36.

*Foreign commodities changed in their form by any manufacturing process in the republic, to be examined and valued for payment of duties in the custom-house of the state, the same as the effects of the country.*

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

All foreign goods which receive a new form in this republic by means of mechanical industry, thereby acquiring an increase of value in the market where they are sold, over that assigned the same by the general tariff in the place where they are introduced, shall be considered in the custom-houses of the state, and valued in the invoice the same as the effects of the country.

For its fulfilment, the governor of the state, *pro tem.*, shall cause it to be printed, published and circulated.

Given in Saltillo, on the 23d of May, 1827.

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No. 37.

Regulations to be observed in the administration of the towns as regards the political economy thereof.

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DECREE No. 38.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. On the 24th instant, at 10 o'clock, A. M., congress shall convene and choose the regular deputies proprietors and one supletory, who are to compose the permanent deputation stated in article 88 of the constitution.

ART. 2. On the same day at half past eleven, the ayuntamiento and the state officers shall meet in the galleries of the capitol.

ART. 3. The governor shall then present himself, accompanied by the members of the council, and they shall be received agreeably to the regulations. The governor shall take his appropriate seat, and the councillors shall unite with the deputies.

ART. 4. The governor shall then deliver a message, discoursing on the state of affairs, to which the president of congress shall make a summary reply, and conclude by declaring the sessions closed.

The governor of the state, *pro tem.* shall cause the same to be printed, published, and circulated, for the fulfilment thereof.

Given at Saltillo, on the 20th of June, 1827.

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DECREE No. 39.

LAW FOR THE REGULATION OF JUSTICE.

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DECREE No. 40.

The Congress of the state of Coahuila and Texas, desirous that the mining districts of the state may have every support consistent with the present from of government, and that the inhabitants of the said districts be provided therein with all suitable assistance for promoting the increase and prosperity of mining, has thought proper to decree:

ART. 1. In the mining district of the valley of Santa Rosa there shall be a mining deputation, to consist of the alcalde, or person officiating in his stead, and two of the inhabitants, to be chosen by the ayuntamiento of said valley by absolute majority of vote; the said election shall take place, in the present instance, immediately after the publication of this decree, and in future on the first day after the ayuntamiento takes possession of office. Ties in the said elections shall be determined by lot.

ART. 2. At the time designated in the preceding article, and in the same manner, two deputies supletories shall likewise be chosen to fill the place of the proprietors in case of moral or physical disability. Both shall be annually renewed in one half their number, by cessation from office at the close of the first year on the part of those last chosen. No member of the ayuntamiento, or person serving any municipal office shall be elected, until two years after retiring from office.

ART. 3. The members of the mining deputation shall possess the qualifications prescribed in article 160 of the constitution. Their style of address as a body shall be that of señoría, officially only; and on public ceremonies they shall seat themselves in union with the ayuntamiento, wearing a yellow sash for purpose of distinction.

ART. 4. The persons chosen shall enter on the duties of office on the first holiday following their election, and shall take the oath specified in article 120 of the constitution, before the alcalde or person acting in his place.

ART. 5. The ayuntamiento shall transmit a copy of the electoral act to the governor, for the corresponding approval, in case no nullity or substantial defect be contained therein.

ART. 6. Those chosen cannot decline the office, but should they consider they have just cause for so doing, they shall apply to the governor for his decision, discharging the duties of office during the investigation of the subject.

ART. 7. Persons who serve these stations may be re-elected, but not obliged to serve, and the same shall not be chosen to ayuntamiento offices until two years after serving in the deputation.

ART. 8. In the annual renewal of supletory, the one who retires from office may be elected deputy, unless the same shall have supplied the legal default of the proprietors the term of six months.

ART. 9. On nomination of three by the respective ayuntamiento, the deputation shall appoint commissioners, of good character, in mining districts that are now or shall be hereafter discovered without their own to take cognisance in such matters as the former, agreeably to their powers, shall commit to their charge.

ART. 10. With respect to the general administration of mining, besides the provision of the preceding article, they shall possess the attributes marked out and defined in the mining ordinances; formal announcements and records of search and discovery, shall be made before the said deputation, or commissioners thereof; but, in all contested cases, they shall withhold cognisance, and transmit the same accompanied by a statement of the preceding facts and circumstances, to the primary judge of the district wherein the mine is situated.

ART. 11. On the first of December, yearly, the deputation shall report to the executive on the state of the mines and miners, proposing whatever in their opinion may tend to restore, preserve, and promote the prosperity of the mines. The same shall also report the quantity of silver produced, amount of mercury consumed, number of mines in operation, of those abandoned, (stating the causes,) as well as mines newly discovered, and those restored to new operation; demanding of each commissioner, for this object, the attested copies and other documents required. Said report shall be communicated to congress, in order to dictate such measures as the same shall deem proper.

ART. 12. The deputation, in their correspondence with the governor, shall conduct the same directly.

ART. 13. In the other parts of the state where new veins are discovered, or abandoned mines found, the district judges shall maintain the annunciations and records of discovery that shall offer, until the persons interested can apply to the deputation.

ART. 14. The fees for announcement, and for recording a description of the mine discovered; for giving possession, and for survey, and all other operations connected with the subject, shall be collected according to the fee bill which shall be formed by congress, and that used by the deputation of the Real de Catorce, shall govern during the interval.

ART. 15. The Spanish statute or system of mining laws, so far as the same is not opposed to the constitution and laws of the state, shall be observed.

ART. 16. The executive shall direct that part of the archives relative to the mines of the state, to be collected and handed over to the deputation.

ART. 17. The members of the deputation shall be responsible for

abuse committed in the exercise of their functions, and shall be under immediate subjection to the governor.

For its fulfilment, the governor of the state, *pro tem.*, shall cause it to be printed, published and circulated.

Given at Saltillo, on the 22d of June, 1827.

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#### DECREE No. 41.

The Congress of the State of Coahuila and Texas, desirous of coinciding with the measures now becoming general, relative to prohibiting European Spaniards from holding office in the republic of Mexico, so long as Spain shall not acknowledge the independence of the former, and conforming to the verdict of public opinion clearly declared on that subject, has thought proper to decree:

ART. 1. No native of the Spanish dominions shall exercise any office or trust, such as it belongs to the high civil officers of the state to fill, so long as Spain shall not acknowledge the independence of this republic.

ART. 2. The provision of the preceding article shall embrace the ecclesiastical offices and trusts of the secular and regular clergy, so far as regards the exercise of their attributes.

ART. 3. Sons of Mexicans who may have been born in Spain, and are now living in the state, shall not be included in the preceding articles.

ART. 4. The executive shall cause parish priests and missionaries to withdraw from their respective stations during the time established in article 1st.

ART. 5. Officers separated by virtue of this law shall receive half pay, should they hold their offices in their own right, and should they not, they shall be fully replaced by others.

ART. 6. Offices left vacant in consequence of the provision contained in this law, shall be filled provisionally and according to the laws.

ART. 7. For curates whom the executive shall remove in conformity to the provision of article 4, a coadjutor shall be appointed, who shall receive the cusotmary compensation, and the person suspended his corresponding emolument.

For its fulfilment, the governor of the state, *pro tempore*, shall cause it to be printed, published and circulated.

Given at Saltillo, on the 23d of June, 1827.

## DECREE No. 1,

## OF THE CONSTITUTIONAL CONGRESS.

*Election of Governor, Vice Governor and Councillors.*

The Constitutional Congress of the state of Coahuila and Texas, exercising the 2d, 3d, and 4th prerogatives granted the same by article 97, section 4, title 1 of the constitution, and having made, in pursuance thereof, the general examination of votes which the several candidates for governor, vice governor, and voters of the executive council have received in the electoral district assemblies, conformably to the provision of article 132, section 4, title 2, and no one having received the absolute majority required by article 133, proceeded to the respective choice of the aforesaid officers, and, having performed the election in the manner and form as prescribed in articles 134, 135, and 136, in virtue thereof decrees:

ART. 1. Jose Maria Viesca is elected governor of the state of Coahuila and Texas.

ART. 2. Victor Blanco is elected vice governor of said state.

ART. 3. Santiago de Valle, Dionicio Elisondo, and licentiate Jose Ignacio de Cardenas, are elected councillors proprietors.

ART. 4. Antonio Pereira and Cayetano Ramos are likewise elected councillors suplitories.

ART. 5. In accordance with article 15 of the law of convocation of March 23d, the persons elected shall present themselves on the 1st of August next, to take the oath the constitution prescribes, and to take possession of office.

For its fulfilment, the governor of the state, pro tem. shall cause it to be printed, published and circulated.

Given in Saltillo, on the 4th of July, 1827.

JOSE IGNACIO SANCHEZ NAVARRO,  
*President.*

JOSE ANTONIO TIJERINA, *Deputy Sec'y.*  
JOSE FRANCISCO MADERO, *Dep. Sec'y.*

## DECREE No. 2.

The Constitutional Congress of the State of Coahuila and Texas has thought proper to decree:

ART. 1. The cock-pit location of the whole state shall be leased at public auction, to be cried on three festival days, specifying the day the sale shall be closed, which shall be to the highest bidder for periods of five years, with the understanding that the same may sub-lease the respective pits in the other places.

**ART. 2.** The purchaser of the lease shall give bond with security obligating himself to pay at the end of each year, and the proceeds shall enter the state treasury.

**ART. 3.** The judge of the treasury shall preside the auction, the treasurer being present; and, in his default, the agent having charge of the rents.

**ART. 4.** Billiard tables shall pay a tax of twenty-four dollars per annum, to be paid in three equal instalments in advance.

**ART. 5.** Those who established billiard tables, on condition of paying such tax as should be assigned them, shall pay what is due, the same as other owners of tables, and shall conform to the last contract they made with the agent having charge of the tobacco rent. Those who established tables without any understanding on the subject, shall pay in the same manner.

**ART. 6.** In this town the entries shall be made in the state treasury, in other places in the agencies of the tobacco rent.

For its fulfilment, the governor of the state, pro tem., shall cause it to be printed, published and circulated.

Given in Saltillo, on the 28th of July, 1827.

JOSE IGNACIO SANCHES, *President.*

JOSE ANTONIO TIJERINA, *Dep. Sec'y.*

JOSE FRANCISCO MADERO, *Dep. Sec'y.*

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### DECREE No. 3.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

**ART. 1.** The two per cent. impost on the circulation of money by decree of the general congress of June 11th, 1822, heretofore collected only in this town, shall embrace all the towns of the state, and the same shall continue to be exacted in future as a rent of said state.

**ART. 2.** The collection shall be made in each town at the time of removal of any amount of money whether the same be destined to a place within or without the state; the agents and receivers of excise shall, for the present, have charge of the collection thereof in the department of this town; and the agents charged with the tobacco rent, and clerks for weighing and inspecting therein, in the department of Monclova and Texas.

**ART. 3.** The aforesaid officers shall keep a book, wherein they shall set down the parcels they collect, specifying the date, and name of the party that causes, and they shall sign the same, the respective alcalde shall also sign, and the latter shall examine the corresponding permit or writing, certifying that the duty has been paid, that shall be given to the party interested.

**ART. 4.** Those charged with branch stores for the exclusive sale of cigars, or receivers of the departments, shall forward every six



months to their respective general agents, a statement of the amount collected, examined, and approved by the alcalde.

ART. 5. Expense of books, paper and postage, after establishment of the claim, shall be paid by the rent.

ART. 6. The principal agents shall pay themselves six per cent. on what they themselves collect in their agencies, and allow their subordinates four per cent. on what the latter collect, the remaining two per cent. to be in favor of the former for labor incurred in making out general accounts, in correspondence, and other business connected therewith.

ART. 7. Contraband money that is seized shall be divided agreeably to the confiscation compact, allowing from one to two hundred dollars for travelling expenses, for which amount a permit shall always be obtained.

ART. 8. Persons guilty in any manner of abuse of office, shall pay threefold, forfeit their office, and be disqualified for holding any other.

For its fulfilment, the governor of the state, pro tem., shall cause it to be printed, published and circulated.

Given in Saltillo, the 31st of July, 1827.

JOSE MARIA ECHAIS, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

JUAN A. GONZALES, *Dep. Sec'y.*

#### DECREE No. 4.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The name of the town of San Fernando shall be permitted to be changed to that of Rosas.

ART. 2. Likewise that of the town of Camargo to that of Guerrero.

For its fulfilment, the constitutional governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 7th of August, 1827.

JOSE MARIA ECHAIS, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

JUAN A. GONZALES, *Dep. Sec'y.*

#### DECREE No. 5.

The Congress of the state of Coahuila and Texas has thought proper to decree:

Jose Ignacio Estevan is a special citizen of this state.

For its fulfilment, the constitutional vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 17th of August, 1827.

JOSE MARIA ECHAIS, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

JUAN A. GONZALES, *Dep. Sec'y.*

DECREE No. 6.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

ART. 1. Silver in bars, or pieces of plate, shall for the present pay a duty of three per cent. in the place where it is extracted.

ART. 2. The provision of Decree No. 3, respecting the circulation of money except the last part of article 7, relative to money for travelling expenses, shall be observed in the collection of the duty aforesaid.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 21st of August, 1827.

JOSE MARIA ECHAIS, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

JUAN A. GONZALES, *Dep. Sec'y.*

DECREE No. 7.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Simple theft of any kind, not exceeding from one to ten dollars, shall be punished with a fine of from ten to thirty dollars, or labor on the public works from one to three months; for the second offence the punishment shall be doubled, and shall indispensably be the latter. For the third offence in larceny mentioned in this article, besides the punishment specified in the second part thereof, the person so offending shall be taken to the most public place, with a board with the following inscription, *for theft*, placed upon his head.

ART. 2. Simple theft exceeding ten and not exceeding one hundred dollars, shall be punished with not less than one nor more than two years labor, on the public works.

ART. 3. To adjudge this punishment, the judge shall be required only to prove the crime in evidence to the accused in summary trial, also in presence of two judges chosen, one by the plaintiff, the other by the defendant.

ART. 4. The demand having been set down in the record of verbal trials that shall be kept in every court of justice, the defendant's contestation shall be set down in an extract of the evidence that appears pro and con—the whole expressed in the plainest manner.

ART. 5. After the pleadings of the parties are heard, the plaintiff and defendant shall retire, and the judges shall determine the crime, if there be any, and, setting down whatever it shall be, the judge shall pronounce sentence agreeably to this law, which sentence

immediately shall be made known to the plaintiff and defendant, and applied to the latter, such as it shall result to the same; in the whole the provision of article 3 of the organic law of justice shall be observed.

ART. 6. Theft committed in passing near or within any dwelling shall be punished with double the corporal penalty specified in articles 1st and 2d.

ART. 7. For theft committed in the country of from one to nine head of small stock, as sheep and goats; and of from one to three of large stock of any kind, the punishment shall be labor on the public works for a term not less than six months nor more than two years, for which the formalities prescribed in articles 3, 4, and 5 shall be observed.

ART. 8. When theft of any kind shall be accompanied by force or violence of any kind, as well as by blows, mutilation of members, or death, the corresponding judicial process shall be instituted against the delinquent or delinquents, which shall be closed in conformity to the laws.

ART. 9. When the theft exceeds one hundred dollars, the provision of the foregoing article shall be observed.

ART. 10. Offenders who shall be sentenced to public works shall be destined in preference to the repair of prisons, and construction of new ones where there are none, and the amount necessary for their support shall be taken from the public funds.

ART. 11. The penalties imposed by this law upon thieves or robbers shall be understood as not preventing in any way that, after said penalties are concluded, they indemnify the lawful owner for the theft, or before, should they have the means, or should any stolen articles exist; the fine specified in article 1 shall be paid in preference.

ART. 12. Any judge who, in consequence of subornation, bribery, negligence, or partiality, shall not fully comply with this law, besides being compelled to pay a fine not less than two hundred nor more than five hundred dollars, shall be amenable to the law of the 24th of March, 1813, except the pecuniary penalties imposed therein.

ART. 13. The alcaldes or judges shall transmit every month to the first hall of the tribunal of justice of the state, a copy of sentences they have pronounced, and causes that have determined them, and are in conformity to this law, in order that, should they be found on investigation to have proceeded contrary to justice, the responsibility may be exacted of the said alcaldes or judges, in accordance with the law of the 24th of March, 1813.

ART. 14. Receivers of stolen goods, agents or protectors of thieves, shall suffer the same penalty as the latter, after the corresponding proof thereof.

ART. 15. On the publication of the Penal Code of the State, this law shall cease to have effect.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 17th of August, 1827.

JOSE MARIA ECHAI, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

JOSE A. TIJERINA, *Dep. Sec'y.*

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### DECREE No. 8.

The Congress of the State of Coahuila and Texas, to prevent abuses committed in driving large stock, greatly retarding the increase and propagation thereof, which can only be expected by having order and suitable regulations, and likewise to prevent fraud upon the state revenue with respect to this class of duties, which form a part of the same, has thought proper to decree:

ART. 1. The period of mustang chases shall be from the first of October to the last of February inclusive, and it shall not be permitted at any other time.

ART. 2. The legally established tax in favor of the state revenue shall be two rials a head for horses, old and young; two dollars for mules, and four rials for horned cattle; the said tax to be understood only in relation to such as have no brand or owner, and are caught on vacant lands.

ART. 3. To collect the tax required by this law, the executive shall appoint in each town a person of his confidence, who shall receive a compensation of six per cent. on the amount he collects.

ART. 4. In each chase, or course, the individual who first encourages the same, or person acting in his stead, shall have the direction or superintendence, for which a license shall be obtained from the respective judge, who, with the concurrence of the person charged by the executive with the collection of the tax provided in article 2, shall give the same, and during the period designated in article 1 the license shall not be withheld.

ART. 5. The leader of each party shall be answerable for abuses committed in that under his command, and shall also be responsible for presenting all the beasts collected, of whatever kind they may be, to the commissioner of the place of his residence.

ART. 6. The commissioner shall keep a book of common paper, wherein all the lots or parcels that come into his possession, shall be entered, and the same shall be signed by himself, the leader of the chase, and the alcalde.

ART. 7. Branded beasts, whose owners are not known, shall be presented to the ayuntamiento, which shall keep a book made of common paper, to be called, *of strays*, wherein an account shall be kept of the same, and their class, color and brand described.

ART. 8. Lists of said beasts shall be immediately sent to all the ayuntamientos of the state, that they may cause the same to be ad-

vertised in their districts, to ascertain to whom they belong, for the formal delivery thereof, observing the arrangement made in the second part of article 13. of the economical regulations of towns.

ART. 9. The governor, on receiving the notice that shall be given him every six months, shall communicate the same to those of the adjoining states of Nuevo Leon and Tamaulipas for the purposes specified in the first part of the preceding article.

ART. 10. For placing the beasts specified in article 7. in deposit, preference shall be given to the person who presents the same, giving proper security, and with respect to the charges to be paid, in order to take them away, the established custom shall be complied with.

ART. 11. Both the beasts specified in article 7, and those found in the towns, also having no brand, including neat cattle, shall be deposited the term of six months, after which time, should no person appear to claim the same, they shall be considered as strays, and, after valuation, sold at public auction, the proceeds thereof to be delivered to the respective commissioner to be paid over to the state treasury. The owners of horned cattle and other beasts sold in this manner, shall be entitled to the value thereof on proving property before the expiration of three years—after that time they shall possess no right.

ART. 12. The commissioners shall render their accounts (proved) annually to the state treasury, wherein, after deducting their compensation, they shall enter the amount collected.

ART. 13. Those who transgress the provision of this law, or, abusing the privileges of the chase, kill or conceal beasts of any kind, besides paying the established tax, shall be fined by the judges twenty-five dollars for the first offence, and fifty for the second, to be applied to the funds of the ayuntamiento. Those who have not the means of meeting the fine, shall be imprisoned from one to two months, or be destined to from twenty to forty days labor on public works. For the third offence they shall incur double the second fine or corporal punishment, and for the fourth be deprived of the privilege of the chase. The formalities prescribed in articles 2 and 3 of the law of regulations of tribunals, No. 39, shall be observed in cases provided in this article.

ART. 14. Every citizen shall be authorised to act in demanding the fulfilment of this law, by himself, or through the medium of the individual mentioned in article 3. The latter shall be responsible for any dissimulation in the discharge of his duties.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 31st of August, 1827.

RAMON GARCIA ROJAS, *President.*

JOSE A. TIJERINA, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

**DECREE No. 9.**

**The Congress of the State of Coahuila and Texas has thought proper to decree as follows:**

**ART. 1.** The executive shall give power to the chief agents in the tobacco department, in default of a seal to legalise the account books of merchants, of proprietors of land estates, and other dealers, with their own signature, agreeably to the provision of article 16 of the stamp paper regulations. Said agents, under their own responsibility, may delegate this power to their subordinates residing in different municipalities.

**ART. 2.** The agents and their subordinates, as the case may be, in a book made of common paper, paged and destined to that purpose, shall keep an account of the books they stamp or legalise, number of leaves of which they consist, stating the names of the owners, and place of residence. The lot or parcel shall be signed by the agent or officer, the owner of the book, and the respective alcalde.

**ART. 3.** At the end of the year, an advertisement shall be posted in each town, specifying the books legalised, the amount paid for each, and the names of the owners.

**ART. 4.** The term of one month shall be allowed to merchants and dealers for applying to have their books stamped, both new ones and those already commenced. After the term aforesaid, the transgressors, besides the illegality mentioned in article 10, chap. 30, of the stamp paper law, shall be subject to a fine of twenty-five dollars for every book they fail to present, independent of paying the tax of the paper. The fines shall be applied to the funds for public instruction.

**ART. 5.** Any individual of the town shall have power to interfere, demanding a compliance with the provision of this law.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 11th of September, 1827.

**RAMON GARCIA ROJAS, *President.***

**JOSE A. TIJERINA, *Sec'y Supletory.***

**MIGUEL ARCINEAGA, *Dep. Sec'y.***

**EXECUTIVE DEPARTMENT OF THE STATE }  
OF COAHUILA AND TEXAS. }**

*Secretary's Office of the Congress of Coahuila and Texas.*  
**Instructions to which the commissioner for the distribution of lands to the new colonists who present themselves to settle in the State, according to the colonisation law of March 24th, 1825, shall conform:**

**Art. 1. The commissioner shall be obligated, pursuant to the contract made up by the empresario with the government, also to the colo-**

nisation law of the 24th of March, to examine in the most scrupulous manner the certificates, which colonists from foreign countries are required to bring from the authorities of the place from which they come, thereby proving themselves to be of the Christian religion, and to possess a good moral character, without which requisites they shall not be admitted in the colony.

ART. 2. In order to guard against false certificates, the commissioner shall admit none until after the empresario, to whom they shall previously be transmitted for the purpose, shall give information in writing relative to the legitimacy of the same.

ART. 3. He shall administer to each of the new colonists from foreign countries, the oath in form to obey the constitution of this republic, that of the state, and the general and especial laws of his adopted country.

ART. 4. He shall issue the land titles in the name of the state, in conformity to the law, giving the new settlers possession of the same in legal form, and previously citing the adjoining proprietors, should there be any.

ART. 5. He shall not give possession to any colonist, settled, or intending to settle, within twenty frontier or border leagues of the United States of the North, and ten of the Gulf of Mexico, unless the person interested shall present him a special order from this government, wherein the approbation thereof of the national government shall be manifested.

ART. 6. He shall adopt the necessary measures that no vacant lands be left between possessions, and in order that the limits of each one may be known at first sight, he shall oblige the colonists to set land marks upon their lands within one year, with fixed and permanent boundaries.

ART. 7. He shall appoint, under his own responsibility, the surveyor, who shall run off the lands scientifically, previously requiring him to take the oath in form well and faithfully to execute the duties of his office.

ART. 8. He shall form a book in calf of paper bearing the impression of the third seal, wherein he shall write the titles of the lands which he distributes to the colonists, specifying their names, the boundaries, and other requisites and legal circumstances; and he shall take from the said book attested copies of each possession upon paper of the second seal, which he shall deliver to the person interested to serve him for a title.

ART. 9. Each settler shall pay the value of the stamp paper used in issuing his titles, both in the original and in the attested copy.

ART. 10. Said book shall be preserved in the archives of the new colony, and an abstract shall be taken therefrom to be transmitted to government, containing the number and names of all the colonists, the quantity of land given to each, expressing those which are for cultivation, irrigable or not irrigable, and those which are given them for grazing lands.

ART. 11. He shall select the site most appropriate for founding the town or towns, which are to be established, according to the number of families of which the colony consists, bearing in mind the provision of the colonisation law upon this subject.

ART. 12. The site destined for the new town having been determined, he shall see that the principal lines run north and south, east and west:—he shall designate a square, measuring one hundred and twenty varas on each side, exclusive of the streets, to be called the *Principal or Constitutional Square*. This shall be the central point from which the streets shall run for forming squares or blocks thereon agreeably to the accompanying plan.

ART. 13. The block fronting the principal square, upon the east side, shall be destined for a church, curate's dwelling, and other ecclesiastical edifices; and that on the west, for municipal buildings or town halls. In another suitable place, he shall point out a block for a market square, one for a jail and house of correction, one for a school and other buildings for public instruction, and another without the limits of the town for a burial ground.

ART. 14. He shall cause the streets to be laid off straight, twenty yards wide, for the salubrity of the town.

ART. 15. Mechanics, who, on the founding of a new town, present themselves to settle therein, shall be entitled to a lot each, to be attended with no expense, except the cost of the stamped paper necessary for issuing their titles, and the small tax of one dollar per annum for building the church.

ART. 16. The lots mentioned in the preceding article shall be distributed by lot, with the exception of the empresario, to whom two lots shall be given in the site he selects.

ART. 17. The other lots shall be valued by appraisers, and sold out to the other colonists according to the valuation. Should there be several applicants for any lot or lots, on account of their more eligible situation, or other circumstances that may cause competition, they shall decide by lot, in the manner provided in the preceding article. The product of the said lots shall be appropriated to building a church in the town.

ART. 18. He shall proceed, together with the empresario, to have all the inhabitants belonging to the jurisdiction of each town take lots therein, and build their houses within the time specified, under penalty of forfeiting their lots.

ART. 19. He shall form a book in calf for each new town, wherein the appropriation of lots, whether by donation or sale, shall be recorded, expressing their boundaries, and other particulars agreeably to the usual form, from which attested copies shall be taken, upon paper of the corresponding stamp, to be delivered to the persons interested to serve them as titles.

ART. 20. He shall execute a topographical plan comprising the towns founded in the colony, which he shall forward to the government, leaving in the colonial register an exact copy thereof.



ART. 21. He shall cause a ferry to be established at each crossing of the rivers upon the highways, whereon any town is founded;—the flat or boat to be provided at the expense of the inhabitants of the said town, establishing moderate rates of toll, out of which the ferryman shall be paid, the boats repaired, and the remainder added to the public funds.

ART. 22. In places where there is no town, he shall charge the colonist settling in any of the same with the establishment of ferries, taking a moderate toll until these taxes are rented out for the use of the state. Colonists who resolve to establish ferries on the terms herein indicated, shall keep an exact and certified account of the expense they incur in building boats, and another, also attested, of the product of the toll, to entitle them, when these taxes are rented by the state, to receive an indemnification for the deficiency of the toll, at present allowed them, for covering the expense.

ART. 23. He shall preside at the popular elections mentioned in article 40 of the colonisation law, for choosing the ayuntamiento and putting the persons chosen in possession of office.

ART. 24. He shall take special care that the portions of land granted the colonists by articles 14, 15, and 16, be measured by the surveyors with the greatest accuracy, without permitting any one to take more land than what is pointed out by the law, and in the contrary event he shall be personally responsible.

ART. 25. Should any colonist, agreeably to article 17, solicit to have the quantity of land pointed out in the aforesaid articles, increased in his favor, on account of his family, industry, and enterprise, he shall manifest the same, setting forth the reasons in which he founds his petition, in writing, to the commissioner, who shall forward the same to the executive, accompanied by his respective report, under the most rigid responsibility of providing what is proper.

ART. 26. All public instruments, titles, or documents whatever, drawn by the commissioner, shall be written in the Spanish language: the same shall be used in memorials, decrees, and reports presented by the colonists or empresarios on any subject whatever, whether to be transmitted to the government, or deposited in the archives of the colony.

ART. 27. All public instruments of possession, and attested copies signed by the commissioner, shall be attested by two assisting witnesses.

ART. 28. The commissioner shall be personally responsible for all acts and provisions by him effected or performed in violation of the colonisation law and these instructions.

Saltillo, September 4th, 1827.

JOSE A. TIJERINA, *Sec'y by substitution.*  
MIGUEL ARCINEAGA, *Deputy Sec'y.*

*Additional Article.*—The commissioner shall not grant any land,

of himself, nor give possession upon those traced out for *empresas*, so long as these are not concluded, without the knowledge and consent of the empresario himself, even should the said grant be authorised by the executive.

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*Note.*—On the 15th of May, 1828, congress issued the decree No. 62, regulating the pay to be made to commissioners for their services, and on the 10th of April of the current year, the said congress issued the decree No. 128, which in part reforms and explains these instructions, both which laws shall be borne in mind by every commissioner for the distribution of lands.

Leona Vicario, 25th of April, 1830.

JOSE MARIA VIESCA.

SANTIAGO DE VALLE, Secretary.

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#### DECREE No. 10.

The Congress of the State of Coahuila and Texas decrees as follows:

ART. 1. The ayuntamientos of the towns shall make out and forward annually to the respective chief of department or district, a minute account of the state in which the different objects committed to their charge by the law No. 37 of the 13th of June last, exist; giving notice of the improvement or backwardness they have undergone during their administration, and stating the measures it is proper to dictate to remove the obstacles that impede their progress.

ART. 2. Said corporations shall post a regular account annually, in the most public places within their respective jurisdiction, stating clearly and minutely therein, the sums that have come into their possession, and the distribution they have made of the same, independent of the certified accounts, as provided by article 133 of the aforementioned law No. 37, which they shall forward every year.

ART. 3. At the close of their administration, and before their renewal, the ayuntamientos under their responsibility shall fulfil the provision of this decree.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 5th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JOSE A. TIJERINA, *Dep. Sec'y Supletory.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 11.

The Congress of the State of Coahuila and Texas decrees as follows:

ART. 1. The governor, in the reports it shall be his duty to read every year on the opening of the ordinary sessions, shall give in-

formation relative to the public rents of the state, manifesting the values, entries, expenditures, and nett proceeds of each.

ART. 2. The said information shall comprise the term of a financial year, which shall also serve to regulate the presumed or presupposed general expenditure of the state, which shall be presented in the same report.

ART. 3. The financial year shall commence the first of September and terminate the last of August following, wherein a general settlement or adjustment of accounts shall be effected in all offices which receive funds or stock of the public revenue.

ART. 4. The head agents of the rents, and other responsible officers shall forward their corresponding accounts within the peremptory term of two months from the termination of the financial year, that they may be received by the executive by the 31st of October, to enable him to fulfil the purposes contained in article 1st.

ART. 5. At the conclusion of the aforesaid reports, and without being thereby prevented from doing the same on another occasion, he shall propose all the laws that, in his opinion, ought to be enacted to correct the evils that he may have observed in the departments of the public administration, or to promote such improvement as he shall deem proper in each of the same.

ART. 6. These propositions shall be presented composed or written in projects of law, in the manner the executive thinks they should be enacted.

ART. 7. He shall present with due distinction those relating to the public rents, the reforms of which they are susceptible, the financial administration of their expenditures, establishment, extinction, or reduction of imposts, in order to bring the product of all the rents on a level with the general expenditures of the state.

For its fulfilment, the vice governor of the state shall cause it to be printed, published, and circulated.

Given in Saltillo, the 6th of September 1827.

RAMON GARCIA ROJAS, *President.*

JOSE A. TIJERINA, *Sec'y Supletory.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 12.

The Congress of the State of Coahuila and Texas decrees as follows:

ART. 1. The executive of the state, for issuing letters of citizenship to individuals in whose behalf congress shall declare this favor, shall use the following form:

The governor of the state of Coahuila and Texas, to all unto whom these presents may come, be it known: That J. N. an inhabitant of —, having applied for the letter of citizenship on account of such a decree, or for such reasons, and having shown that he possesses the merit and qualifications to entitle him to this favor, I have thought

proper to propose him to the honorable congress, which by decree (number and date) has been pleased to grant to the aforementioned N. letter of citizenship, that he be considered and respected as such throughout the state, and enjoy therein the rights and privileges that belong to him agreeably to the constitution and laws of the state, submitting to the burthens and duties imposed by the same upon all the citizens of Coahuila and Texas. Wherefore, I command all the tribunals, justices, chiefs, and other authorities of the state, civil military, and ecclesiastical, to regard and respect the aforementioned N. as a citizen of Coahuila and Texas, protecting and causing to be protected the rights and privileges that belong to him as such, agreeably to the constitution of the state and laws that do now, or may hereafter exist, and that this letter be directed to the person interested for such use as shall best suit his purpose. Given in ——— date. Signature of the governor and secretary.

ART. 2. Said letters shall be written on paper stamped with the first seal.

For its fulfilment, the vice-governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 11th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JOSE A. TIJERINA, *Dep. Sec'y Supletory.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

### DECREE No. 13.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. John Cameron is hereby declared a citizen of the state.

ART. 2. The executive shall order the corresponding letter to be issued to the said Cameron, also to Santiago Hewetson, who was constituted a citizen on the 11th of August last.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 12th of September, 1827.

RAMON ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

### DECREE No. 14.

The Congress of the State of Coahuila and Texas decrees as follows:

ART. 1. Maize, beans, and red pepper, being articles indispensably required, shall be exempted from paying excise duties.

ART. 2. In pursuance thereof, the orders of the 20th September, 1825, relative to the aforementioned articles, are hereby repealed.

For its fulfilment the vice governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 13th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No 15.

The Congress of the state of Coahuila and Texas decrees as follows:

The tribunal of justice shall not assist in the public ceremonies at any kind of festive concourse, nor on occasion of national festivals, as provided in articles 49 and 79 of the law of justice, No. 39, which shall be repealed so far as regards this provision, and in every other respect shall remain in force.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 13th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 16.

The Congress of the state of Coahuila and Texas decrees as follows:

At the expiration of the term specified in Decree No. 9. of the 4th instant, the executive may authorise the first alcaldes of the respective towns, associated with the chief agents, or responsible subordinates of the tobacco department, and syndic, to examine whether the account books of merchants, of proprietors of haciendas, and other dealers, are legalised, that should they not be, the responsibility expressed in the same article may be rendered effectual.

For its fulfilment, the vice governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 14th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 17.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. All persons under criminal prosecution, now in prison, shall be set at liberty, except for treason, arson, assault and robbery of any kind, adultery, murder, and a repetition of offence in any kind of crime.

ART. 2. Likewise those under prosecution for manslaughter committed in self defence, by accident, and persons not of a treacherous character, shall be set at liberty.

ART. 3. Convicts sentenced to a fortress for one year, or to public works for two, for crimes not excepted by this law, shall also be liberated.

ART. 4. This pardon shall be granted, notwithstanding the atonement which crimes should pay to public justice, as an example, but without injury to a third person, and in exclusion of those who shall have transgressed between this time and the publication of this decree.

ART. 5. Fugitives and absent persons, to avail themselves of this pardon, shall present themselves within 30 days from the publication of this decree to their respective municipalities. This decree shall be read in presence of the prisoners and convicts.

ART. 6. Criminals, deserving capital punishment for any crime whatever, and having fled from justice, who shall present themselves in 90 days from the publication of this decree, shall be exonerated from the said punishment, and subject to the greatest unusual penalty.

ART. 7. Those not deserving capital punishment, who shall present themselves in the same time, shall incur one half the penalty they ought to suffer according to law.

ART. 8. This law shall be published in this town on the morrow, and in the other towns of the state as early as possible.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 15th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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### DECREE No. 18.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. At the expiration of six months from the publication of the constitution in the capital of each district, a list of the slaves in the respective municipalities, their age, names, and sex, being distinctly expressed, shall be made in all the towns of the state.

ART. 2. Each ayuntamiento shall keep a register, wherein they shall keep an account of children (Coahuilteixians) born of slave parents, from the publication of the constitution, giving notice to government every three months.

ART. 3. All deaths of slaves shall be noted down in said register, of which notice shall be given to government, as specified in the preceding article.

ART. 4. Those who introduce slaves, after the expiration of the

term specified in article 13 of the constitution, shall be subject to the penalties established by the general law of the 13th of July, 1824.

ART. 5. Slaves, whose owners have no heirs apparent according to the existing laws, shall be immediately free on the decease of their masters, and shall not pass to any other kind of succession whatever under any aspect.

ART. 6. The manumission mentioned in the preceding article shall not take place when the master, or his heirs, are poisoned or assassinated by one of their slaves; in that case they shall be subject to the provision of the laws.

ART. 7. In each change of owner of slaves, in the nearest succession, even of heirs apparent, the tenth part of those who are to pass to the new order, shall be manumitted; the said portion to be determined by lot, before the ayuntamiento of the municipal district.

ART. 8. Children and parents by adoption shall not mutually inherit slave property.

ART. 9. The ayuntamientos, under their most rigid responsibility, shall take particular care that free children, born of slaves, receive the best education that can be given them: placing them, for that purpose, at the public schools and other places of instruction, wherein they may become useful to society.

ART. 10. Ayuntamientos that shall not be faithful in the fulfilment of this law, shall suffer a fine of five hundred dollars, which the executive shall order appropriated to the benefit of public schools.

ART. 11. This law shall be first published in this town on the morrow, and in the other towns on the day following the receipt thereof. The same shall be republished annually on the 16th of September until the year 1840.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 15th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 19.

The Congress of the State of Coahuila and Texas decrees as follows:

ART. 1. When the vice governor takes the place of the governor, from impossibility on the part of the latter, he shall receive two-thirds of the difference in the salaries assigned these offices.

ART. 2. The same shall be observed when a councillor takes the place of the governor from default of the latter and of the vice governor.

ART. 3. The substitute, whom the vice governor shall appoint as provided in article 116 of the constitution, should he receive a less salary out of the state rents than the vice governor, shall be paid two-

thirds of the difference, and should he receive none, two-thirds of the entire salary of the vice governor.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 18th of September, 1827.

RAMON GARCIA ROJAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

This decree was returned by the governor, and amended by congress on the 16th of October, and shall be observed as ratified on that date.

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### DECREE No. 20.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. A sub-receiver's office of excise duties shall be established in the hacienda de Parras.

ART. 2. The person entrusted with the same shall also have charge of the branch cigar store, and stamped paper, and shall see to the collection of the other state rents within his respective limits, and that there be no smuggling in any department belonging to his charge.

ART. 3. Said officer shall be appointed by the executive, who shall see that he gives security to the amount of two thousand dollars for the faithful management of the funds and stock committed to his charge.

ART. 4. For the present, he shall be under immediate subjection to the chief agent of the tobacco department, and the receiver of excise duties of Parras in their respective departments, and shall receive, as a compensation for his services, the same percentage as the sub-receivers and agents of branch cigar establishments.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 2d of October, 1827.

JOSE M. de CARDENAS, *President.*

JUAN A. GONZALES, *Sec'y Supletory.*

JOSE I. SANCHES, *Dep. Sec'y.*

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### DECREE No. 21.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. Leon R. Almy, George A. Nixon, and John L. Woodbury, are hereby declared citizens of the state of Coahuila and Texas.

ART. 2. The executive shall issue them the corresponding letters of citizenship.



For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 10th of October, 1827.

JOSE M. de CARDENAS, *President.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

JOSE I. SANCHES, *Dep. Sec'y.*

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DECREE No 22.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The executive shall solicit contractors to open wagon roads in places where there are none.

ART. 2. Provisionally, the opening of the following roads shall be undertaken, to wit:—That leading from the town of Guerrero, in the district of the same name, to Laredo; that from Santa Rosa to the Presidio del Norte by way of the Alameda; and that from this capital to Parras by way of Infiernillo, or any other more convenient route.

ART. 3. The contractors shall enter into articles of agreement with the executive to indemnify themselves for their expenses with the product of the toll; and so soon as the said expenses, being the amount in which they pledge themselves to complete the undertaking, shall be covered, the toll thenceforth arising shall pay the profits on the capital as agreed on by the executive with the said contractors.

ART. 4. The contracts made by the executive shall not go into effect until approved by congress, to whom they shall be immediately transmitted.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 12th of October, 1827.

JOSE M. de CARDENAS, *President.*

MIGUEL ARCINEAGA, *Dep Sec'y.*

JOSE I. SANCHES, *Dep. Sec'y.*

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DECREE No. 23.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. In haciendas and ranchos containing a population of more than five hundred souls, the respective electoral meetings or juntas shall choose a commissary of police and a syndic.

ART. 2. Besides the powers allowed them by article 156 of the regulations for the financial administration of the town, the commissaries shall possess the attributes prescribed to the constitutional alcaldes by articles from 1 to 9 inclusive of section first of the law regulating the administration of justice, No. 39.

ART. 3. They shall also officiate as peace officers in entire conformity to the aforesaid law, No. 39, furnishing the parties with the copies they shall request; but, the latter to establish a trial by writing, shall effect it before the respective alcaldes.

ART. 4. Superintendents, stewards, and subordinates receiving a salary, belonging to haciendas and ranchos, shall not be commissaries of the same.

ART. 5. Tenants and residents, or persons seeking a support by following some pursuit therein, may be elected commissaries and syndics; and in case there are no such persons, the individuals mentioned in the preceding article may be elected, with the exception of superintendents.

ART. 6. In haciendas belonging to several owners, the same may be elected commissaries and syndics, provided they possess the constitutional qualifications.

ART. 7. Doubts that arise at the electoral meetings with respect to these elections, shall be decided by the said meetings.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, the 13th of October, 1827.

JOSE M. de CARDENAS, *President.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

JOSE I. SANCHES, *Dep. Sec'y.*

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#### DECREE No. 24.

The Congress of the state of Coahuila and Texas, to decide the doubts proposed for consultation by the president of the tribunal of justice through the channel of the executive, has thought proper to decree:

ART. 1. The first and second halls, without distinction, shall take cognisance in all cases prescribed to the former by article 62 of the law regulating the administration of justice.

ART. 2. In civil and criminal cases, cognisance shall be taken in appeals by the hall which the appellant shall designate when the appeal is made.

ART. 3. Criminal causes that do not come directed to a particular hall, shall be equally distributed to both by the minister of the third.

ART. 4. The respective hall that did not decide in the first stage, shall take cognisance in the new trial.

ART. 5. Articles 57 and 62 of the law regulating the administration of justice, No. 39, so far as they are opposed to this decree, shall be repealed.

For its fulfilment, the governor of the state shall cause in to be printed, published and circulated.

Given in Saltillo, on the 13th of October, 1827.

## DECREE No. 25.

The Congress of the state of Coahuila and Texas, in attention to the subject proposed in consultation by the minister of the tribunal of justice, through the medium of the governor, on the 11th of September last, relative to the explanation of article 56 of law No. 39, regulating the administration of justice, has thought proper to decree as follows:—

ART. 1. When two or more criminals are joined in any cause each one shall nominate two judges as colleagues.

ART. 2. The criminals shall choose by absolute majority of vote from the whole number of colleagues nominated. Should none receive such majority, those shall run who receive the greatest number. Should there be a tie, the balloting shall be repeated once only—and should there again be a tie, it shall be determined by lot.

ART. 3. The following persons shall not be colleagues,—the deputies of congress of the state, the governor, vice governor, councillors, secretary of state, military men, ecclesiastics, or any other privileged person; neither shall any individual be a colleague who has betrayed the public trust, even should he be re-qualified.

ART. 4. Should a complaint or accusation arise against any alcalde, or inferior judge, the tribunal united shall declare whether there be a just ground of action.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 22d of October, 1827.

JOSE M. de CARDENAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y. Supletory.*

JOSE I. SANCHES, *Dep. Sec'y.*

## DECREE No. 26.

The Congress of the state of Coahuila and Texas decrees as follows:—

ART. 1. Leon R. Almy shall be permitted to introduce and establish in the state a boring machine to cause water to flow spontaneously upon the surface.

ART. 2. For the term of six years, from this date, no other person shall establish machines of this description, without the previous consent of the said Almy, that he may indemnify himself for his expenses, and receive the compensation he deserves for his trouble.

ART. 3. Should he not have introduced and established the said machine at the expiration of one year, he shall forfeit the exclusive privilege granted him in the foregoing article.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 22d of October, 1827.

JOSE M. de CARDENAS, *President.*

JUAN A. GONZALES, *Dep. Sec'y. Supletory.*

JOSE I. SANCHES, *Dep. Sec'y.*

## DECREE No. 27.

The Congress of the state of Coahuila and Texas, in attention to the despatch of the affairs that are pending, and exercising the power granted the same by article 19 of the constitution, decrees:

The sessions shall be prorogued one month.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 30th of October, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

## DECREE No. 28.

The Congress of the state of Coahuila and Texas, desiring, if possible, to put an entire stop to the smuggling of tobacco, and to give the rent all the activity and growth of which it is susceptible, has thought proper to decree:

ART. 1. All smuggled tobacco, seized in the state, shall be confiscated, and after its quality is examined, the value thereof shall be distributed according to the confiscating compact, previously deducting the 25 per cent. duty prescribed in favor of the state rent.

ART. 2. The smuggler, for the first offence, besides losing the tobacco, shall pay twenty-five dollars fine for every twenty-five pounds seized upon him, and should he not have money to pay the said fine, one month in the public works shall be substituted as a punishment equal to every ten dollars; said corporal punishment, whatever be the quantity of tobacco smuggled, shall not exceed four years. Should he repeat the offence, he shall be sentenced to a fortress for six years.

ART. 3. Should the tobacco be of a bad quality, it shall be burnt, and the smuggler fined twelve dollars for every twenty-five pounds, in other respects conforming to the preceding article: and the informer shall be requited with twenty-five dollars out of the state funds.

ART. 4. That the articles 2d and 3d be duly and punctually complied with, the judges, whose duty it is according to the existing laws to declare the confiscation, shall previously take the proper steps within the peremptory term of forty-eight hours, whatever be the quality of the smuggled tobacco, and make the declaration within the said term, conforming to the provision of the articles aforesaid in the application of the punishment, which, whether corporal or pecuniary, shall be executed according to the amount and quality of the tobacco smuggled.

ART. 5. Judges and officers who shall be unfaithful in the fulfilment of this law, shall be responsible to the provision of article 12 of Decree No. 7, issued on the 27th of August last.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo the 2d of November, 1827

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

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DECREE No. 29.

The Congress of the state of Coahuila and Texas decrees as follows:

ART. 1. The town of Saltillo shall be called the city of Leona Vicario.

ART. 2. The name of the town of Estevan de Tlascala shall be changed to that of Villalongin.

ART. 3. In all public instruments, and other writings, official and private, the names designated in the preceding articles shall be used.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo the 15th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

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DECREE No. 30.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

ART. 1. For the better security and distribution of the funds of the public revenue, a vault shall be established, to be styled *Treasury of the State of Coahuila and Texas*, wherein the products of all the rents and taxes of every description, that are now, or shall be hereafter established to pay the proportion belonging to the state of the general expenditures of the republic, and to cover the private disbursements of the said state, shall physically and vitally enter, deducting solely the expense of administration.

ART. 2. The office shall be composed of a general treasurer, whose salary shall be twelve hundred dollars per annum: an accountant receiving five hundred, a clerk three hundred, and a porter ninety-six dollars per annum.

ART. 3. The treasurer shall be appointed by the governor, and approved by congress. To be a treasurer it shall be required to be a Mexican by birth, a native of or domiciliated in the state, having resided three years therein, and discharged some public office with honor.

ART. 4. The accountant shall be appointed by the governor on a nomination of three by the treasurer. The treasurer shall freely appoint and remove the clerk and porter.

ART. 5. The attributes of the general treasurer shall be the same as those formerly exercised by the treasurers and accountants of the

abolished coffers as ministers of the public revenue, so far as they are not opposed to the provision of this decree.

ART. 6. The treasurer shall have exclusive charge of all the funds that enter the treasury, and he alone shall be responsible for any faults that shall arise in the management and distribution thereof.

ART. 7. The treasurer general shall give bonds in the usual form for the faithful discharge of his duties, to the amount of eight thousand dollars.

ART. 8. He shall form, at the earliest possible period, a set of regulations for the internal administration of his office, and shall pass the same to the governor, who, previously hearing the opinion of the council, shall present it, accompanied by his report, to congress for approval.

ART. 9. The income of the treasury shall be distributed by the treasury itself, whether in specie or in warrants to places at a distance, agreeably to the monthly statement of presumed or presupposed expenditures, formed by the governor in view of the general statement approved by congress. A copy of the same shall be transmitted to the treasury for the purpose, signed by the governor, and countersigned by the secretary of state.

ART. 10. The treasurer general shall go on paying the sums contained in the statements of pre-supposed expenses by virtue of the order of the governor, and no sum shall be paid not expressly or tacitly included in said statements, unless subsequently decreed by congress, and ordered by the governor to be executed.

ART. 11. The treasurer shall be responsible for the inobservance of the preceding article; but should the governor order him to make any payment contrary to the provisions made therein, he shall execute it, provided the order contain the following expression: *notwithstanding it has not been decreed by Congress*; whereby the responsibility shall rest with the governor alone.

ART. 12. Chief agents, and any other officers or persons, who manage funds belonging to the public revenue of the state, shall make no payment or delivery of any sum except by virtue of an order or warrant from the treasurer general, and they shall be responsible for all acts in violation of the provision of this article. The corresponding expenses of administration only shall be excepted from the provision herein made.

ART. 13. The treasurer general shall suspend every month, and make an adjustment of funds and the statement as the existing laws provide, and the chief of the department shall be present and authenticate the same, observing the forms prescribed by the said laws.

ART. 14. The treasurer shall forthwith pass the statement aforesaid to the governor, who shall direct a copy thereof to congress, or to the permanent deputation, and also order it to be published for the information and satisfaction of the people.

ART. 15. It shall be the duty of the said treasurer to exact of the

chief agents the statements of adjustment of funds, and monthly and quarterly products, which shall be forwarded to him by said officers; he shall also give notice to the executive of any negligence he observes.

ART. 16. The treasury shall keep a common day-book or journal for a book of general account, with an index at the beginning, wherein all the departments composing the state revenue shall be set down as separate heads, taking the necessary leaves for the purpose, and leaving some in blank for noting any changes that may be made.

ART. 17. All amounts paid out shall be expressed in the said book under the proper head, on the date the payment is made; and the person interested, whether delivering or receiving, shall sign at the end of each amount.

ART. 18. The original book aforesaid, containing the general account of each year, having to be transmitted to the governor, a copy of the same shall be taken to remain in the office for its defence.

ART. 19. Moreover, as many other books shall be kept as there are chief agencies charged with the collection of excise, stamped paper impost on the exportation of money, and tax on silver. One shall be kept for the tax on Mustangs, and another for tithes and other branches of the state revenue.

ART. 20. The payments made by the chief agents and officers, and the charges that result against them from the statements it shall be their duty to transmit at the time of making their entries, shall be set down in the books aforesaid, expressing the date, and observing the same distinction as in the common journal or day book.

ART. 21. All the books shall consist of such number of leaves as shall be considered sufficient for setting down all the parcels or amounts that occur within one year; but the common journal shall be legalised by the governor's signature upon the first and last leaves, and the figure or rubrick of the secretary upon the rest.

ART. 22. The treasurer shall see that the different amounts are set down on the date they occur, without designing them for another day, to enable the governor, as he shall deem proper, to make an extraordinary adjustment of treasury accounts, independent of the ordinary, which shall be made every month, as provided in article 13.

ART. 23. On the day appointed for the ordinary suspension and adjustment, the treasurer shall have all the amounts in the common journal closed and signed, and the statement formed from those mentioned in article 15, wherein are manifested the amounts entered, and those paid out up to the day of adjustment.

ART. 24. The statement provided by the preceding articles shall comprise a distinct account of the departments that have caused the entries into the treasury, and of the distribution of expenses; also a notice of the chief agents who have made the entries it be-

longs to them to make, and a note of those who shall have failed to make them.

ART. 25. Besides the adjustment of the treasury, or particular account of every month, the treasurer shall give a general account of the whole year, for which he shall forward to the governor a statement, drawn up in the same manner as the monthly, the original general day-book, and all the necessary proofs for confirming the said account.

ART. 26. He shall take a receipt from the secretary of state for the delivery of his annual account, and as soon as the said account is approved, he shall receive an adequate document or certificate to that effect.

ART. 27. The treasurer shall be amenable to the law of the 24th of March, 1813, for all the faults he shall commit.

ART. 28. On days of festival the treasurer shall dress in black, with a red sash trimmed with gold. In attendance on public ceremonies he shall take his seat with the ayuntamiento.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 7th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

### DECREE No. 31.

The Congress of the state of Coahuila and Texas has thought proper to decree :

In accusations made against the assessor-general for crimes in his office, the tribunal of justice shall take cognisance agreeably to the provision of article 197 of the constitution, after the step is taken provided in article 4 of Decree number 25, of the 22d of October last.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 7th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

### DECREE No. 32.

The Congress of the state of Coahuila and Texas has thought proper to decree :

ART. 1. The hacienda of San Vicente Alto is hereby constituted a town, to be called Abasolo.



ART. 2. The said town may establish its ayuntamiento, proceeding immediately to the election in conformity to article 37, for the financial administration of the towns, given by the constituent congress, to which the said ayuntamiento shall conform in the exercise of its attributes.

ART. 3. The limits of the new municipality aforesaid, shall embrace the haciendas of San Vicente Baxo, Saus, Tapado, Hermanas, Encinas, and Alamo; the ranchos of Oballos and Vorregas, and all others situated within the limits of the haciendas aforesaid.

ART. 4. The governor shall see that the proper levels are assigned the new town, water, and suitable grounds for public buildings, and for all other establishments the law requires in new towns.

ART. 5. Judicial or administrative subjects, pertaining to the hacienda, constituted a town, that are now pending in the primary courts of Monclova, shall be closed in the courts wherein they are at present placed, unless the parties interested agree to have them terminated in those of the new municipality, in which case they shall be permitted to do so, submitting to the provision of the laws.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 14th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

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#### DECREE No. 33.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The assessor-general shall attend the general and weekly visits to prisons, provided in articles 98 and 99 of the law regulating the administration of justice.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 15th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y.*

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#### DECREE No. 34.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. A junta shall be established in the state to have the direction of the tythes. The governor shall proceed to instal the same as early as possible.

ART. 2. The said junta shall consist of the vice governor, (who

shall officiate as president,) the minister of the third hall of the tribunal, the treasurer, (who shall discharge the duties of accountant,) and two ecclesiastics or secular persons, who shall be appointed, one by the venerable chapter of Monterrey, and the other by that of Durango. The president shall have the casting vote only. The attorney general of the tribunal shall officiate in the same capacity in the said junta.

ART. 3. The junta shall possess the same attributes as prescribed in the ordinance for intendants, so far as they are not opposed to the present form of government and this law.

ART. The junta shall appoint a tythe agent in the district of Monclova, one in that of Parras, and another in that of Saltillo.

ART. 5. To be a tythe agent it shall be required to be a citizen of Coahuila and Texas, in the exercise of his rights, over 25 years of age, a Mexican by birth, and to enjoy no ecclesiastical or military privilege.

ART. 6. No agent shall proceed to any sale of chattels without previous notice of the junta. The latter shall furnish lists of prices for prizing the movable property at the time it is gathered, and stock raisers shall not be compelled to deliver their stock, provided they pay for it at the price established.

ART. 7. Grain shall be sold by order of the junta, which alone shall appoint the time and place wherein it shall be sold; fruit and other perishable articles shall be immediately sold by the agents.

ART. 8. The agents shall remit to the junta, every four months the entire amount produced by the sales; and the latter, immediately on the receipt thereof, shall order it conveyed to the treasury, to be deposited by the treasurer, in a separate coffer, from which it shall not be taken for any purpose whatever, until the corresponding distribution and delivery is made to the persons who are to share the same.

ART. 9. Agents shall be prohibited from trafficking in grain during the term of their administration.

ART. 10. The agents of Monclova shall give bonds, for the faithful performance of their duty, in the sum of four thousand dollars, those of Saltillo and Parras eight thousand each; and all the said agents shall receive as a compensation eight per cent. of the nett proceeds, after deducting all expense.

ART. 11. The secretary's office shall consist of a secretary and a clerk; the former shall receive five hundred dollars, and the latter three hundred dollars salary, per annum.

ART. 12. The salaries mentioned in the preceding article, office expenses, cost of books and correspondence, as well as freight, shelling, granary and other necessary charges, shall be defrayed by the gross tythe product of the state.

ART. 13. The junta shall give the tythe gatherers instructions, to which they shall conform in the collection.

ART. 14. The agents shall appear before the respective alcaldes,

that they may compel those persons to pay the tythes who refuse to do so voluntarily.

ART. 15. The agents, and their subordinate collectors, shall keep an account of the fruits they collect, in large books, the first and last leaves to be signed by the president of the junta, and the rest to be marked with the rubric of the secretary of the same.

ART. 16. The parcels delivered shall express the date of their collection, and contain the signatures of the persons by whom they were paid, or those who sign in their name in consequence of their not being able to write, also that of the alcalde or commissary of the respective place.

ART. 17. At the end of every year, the agents shall make out the account of the whole collection made; specifying the fruits on hand, and those turned into money, and forward the same authenticated, to be revised by the junta, and approved should they be legal. They shall also forward all the original books, wherein the parcels are minutely and clearly manifested. Said books shall be made of paper stamped with the fourth seal.

ART. 18. The junta, in view of all the accounts, shall make out a general account, wherein the due distribution shall be expressed, and shall take two exact copies therefrom to be passed to the governor, one to be kept by himself, and the other transmitted to congress. A copy shall be communicated to the sharers of the accounts of the tythe districts in which they are interested.

ART. 19. The junta shall order a list made out of all persons who have paid tythes, specifying the article and amount paid, and, ordering the same printed, shall forward, through the channel of the respective chiefs of department, a sufficient number of copies to all the ayuntamientos, to be posted in the most public places.

ART. 20. The agent, or his subordinate, who shall be guilty of breach of trust, besides disqualifying himself for being again entrusted, shall be tried according to the law of the 24th of March, 1813.

ART. 21. The junta shall draw up a set of regulations for the internal administration thereof, and through the medium of the governor pass the same to congress for approval.

ART. 22. Should any member of the junta be absolutely unable to attend, his voice shall be supplied by his immediate successor at the time.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 21st of November, 1827.

[The same Signers.]

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#### DECREE No. 35.

The Congress of the state of Coahuila and Texas decrees the following as additional articles to Decree No. 18 of the 15th of September last.

ART. 1. The slave who, for the sake of convenience, shall wish to change his master, shall be permitted to do so, provided the new master indemnify the former for what the slave cost him agreeably to the conveyance.

ART. 2. The manumission mentioned in the decree aforesaid shall not take place should the owner of the slave be assassinated or poisoned by an unknown hand, or die in any other unnatural way.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 24th of November, 1827.

[The same Signers.]

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#### DECREE No. 36.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The towns of Gigedo, Allende, Morelos, Roxas, Nava, and Guerrero, shall be permitted to cut timber on the Rio Sabinas for the term of three years, without paying the tax collected by the ayuntamiento of Santa Rosa.

ART. 2. The municipality of the said valley shall see that the cutting be performed within the proper season for planting trees, and that those who are allowed the privilege comply with the provision of article 119 of the financial regulations of the towns.

ART. 3. Should any fire occur, through negligence, during the time of cutting timber, those who are culpable shall pay the damage agreeably to judicial estimate, and plant trees upon the extent of ground burned over.

ART. 4. Those who shall wish to cut the timber they need, shall previously give notice to the respective ayuntamiento, that the same may inform that of Santa Rosa, in order that the latter may take such measures as it shall deem proper to prevent disorder.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 24th of November, 1827.

[The same Signers.]

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#### DECREE No. 37.

The Congress of the state of Coahuila and Texas, in view of the difficulties manifested by some of the towns, through the channel of the Executive, in complying with the provision of articles 137 and 138 of the law No. 37, given by the Constituent Congress, and desiring they may be better understood, decrees the following explanatory articles:

ART. 1. Only those called natives, and their descendants by whatever lineage, shall be included in the distribution of lands and waters,

mentioned in articles 137 and 138, of the law No. 37, of the 15th of June last.

**ART. 2.** In the distribution that shall be made of the said lands and waters, agreeably to the aforementioned articles, it shall not be requisite that the origin of those called natives be proved, but it shall suffice that in the use and profit of these pieces of arable land, in filling municipal offices, and in other labors, they have been considered as such, for awarding to them their corresponding portions, notwithstanding they may have been looked upon as appendant persons, from having been born in other towns, provided said towns are also composed of natives.

**ART. 3.** In respect to the families of day laborers, or domestic servants, who, having been employed in the service of those who were called natives, or deriving their origin from such, do not need the qualifications required in the foregoing article, their corresponding portion shall be awarded them of the farming tracts herein mentioned.

**ART. 4.** Doubts that arise upon this point shall be determined by the executive, after receiving the reports of the ayuntamiento and chief of the respective department.

**ART. 5.** The privilege granted in the last part of article 138, of the aforementioned law, to natives who have built houses, shall include other citizens who, not being natives, have acquired a legal right to this kind of securities.

**ART. 6.** The term assigned by the executive for investigating the quantity of lands and waters of these participated possessions, and the number of families entitled to the same, having expired, the executive shall establish another prudential and peremptory term for hearing persons excluded, and claiming to be aggrieved, which claims shall be decided administratively as provided in article 4. The latter term having closed, no further action shall be had upon the subject.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 26th of November, 1827.

JOSE F. MADERO, *President.*

JOSE I. SANCHES, *Secretary.*

JOSE A. NAVARRO, *Sec'y.*

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#### DECREE No. 38.

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** All Spaniards, accused by public authority, shall leave the limits of the state within thirty days from the publication of this law.

**ART. 2.** All single men, of whatever trade, station, rank, or occupation, including those domiciliated since the constitution of the state

was adopted, even should they not be single, and married persons separated from their families, shall leave within the aforementioned term. Those domiciliated thirty years in the republic shall be excepted from the provision of the first part of this article.

ART. 3. No Spaniard shall settle in this state, or remain as a transient or travelling person, longer than three days in any town within the limits thereof, so long as Spain shall not acknowledge the independence of this republic.

ART. 4. At the expiration of the fifteen days from the term specified in article 1, the ayuntamientos shall present to the executive a list, accompanied by a duplicate, of those Spaniards who, not being comprised in this law, remain in the state; stating expressly their age, whether married, profession, trade, or occupation, and time of residence in the republic. On receipt of the aforesaid lists, the executive shall pass one of the same to congress.

ART. 5. Those Spaniards who, agreeably to this law, can remain in the state, shall appear on the first of every month before the local authorities, who shall examine the arms they have, not allowing them any other weapons than such as are customary and necessary for their personal defence, or to carry any others in public than a sword during the dangerous hours of the night. The local authorities shall inform themselves concerning the Spaniards who present themselves, and not suffer them to infringe this law in the slightest manner, and should they do so they shall be banished from the state.

ART. 6. Spaniards who remain in the state, when they travel from one place to another therein, shall obtain from the respective local authorities a passport, in which a full description of the person shall be given, which they shall present to the authorities of the town of their destination. When they leave this state to go to another, they shall obtain the passport, with the same requisites, from the governor.

ART. 7. The ayuntamientos shall strictly observe the conduct, manifestation of sentiments, and carriage of the Spaniards; not permitting them, from this time, to hold any meeting in public places composed of more than three persons, and in private not even of this number.

ART. 8. Should certain information be received that any Spaniard or Mexican uses degrading terms in speaking of the actual form of government, or endeavors, even in an indirect manner, to bring it into disrepute, or shows subversive inclinations, he shall be apprehended, summarily tried, and placed at the disposal of the corresponding judge or tribunal, as may be decided.

ART. 9. The authorities who shall manifest the slightest reluctance to comply faithfully with this law, shall be removed from office, and disqualified for filling any other office for the term of five years, unless reinstated by congress; and such shall moreover pay a fine of five hundred dollars, to be appropriated to the funds of public instruction in the state.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 27th of November, 1827.

[The same Signers.]

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DECREE No. 39.

The Congress of the state of Coahuila and Texas has thought proper to decree:

To be a member of the special tribunal mentioned in article 198 of the constitution, besides the qualifications of education and probity, it shall be required to be a citizen in the exercise of his rights, over twenty-five years of age, born in the republic of Mexico, domiciliated in the state, to hold no office in congress, the executive council, or to be under immediate subordination to the executive.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at Saltillo, on the 4th of January, 1828.

JOSE F. MADERO, *President.*

JOSE M. CARDENAS, *Dep. Sec'y.*

JOSE M. ARTIA, *Dep. Sec'y.*

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DECREE No. 40.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Accusations tried before the tribunal of justice, against inferior judges or an assessor for crime of office, shall be despatched within thirty days from the time the solicitation is presented, solely for it to be declared whether there is a just cause of action.

ART. 2. The accusations pending shall be despatched within the same term, to be reckoned from the publication of this decree.

For its fulfilment, the governor of the state shall cause it to be printed published, and circulated.

Given in Saltillo, on the 14th of January, 1828.

[The same Signers.]

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DECREE No. 41.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The ecclesiastical divisions or offices, wherein the executive is to exercise the prerogative according to article 10, of the law No. 37, for the financial administration of the towns, shall be for the present vicarial curacies, permanently established, with offices of principal and assistant sexton.

**ART. 2.** The ecclesiastical authority of Nuevo Leon, being at present that of the greatest part of the state, and that of Durango, in so much of the state as belongs to that diocess, previous to appointing to the ecclesiastical offices or divisions, which are now or shall be hereafter established in Coahuila and Texas, shall forward to the governor a private and circumstantial list of the person or persons, with whom they are intended to be filled, stating the office wherein they are designed to be placed.

**ART. 3.** The governor shall transmit the list privately to the council for the same to report whether they consider any person or persons of the ecclesiastics proposed, dangerous to the tranquillity of the state.

**ART. 4.** The following shall be considered dangerous persons:—First, native Spaniards; second, those partial to a monarchical or central form of government; third, those evidently fanatics.

**ART. 5.** The governor, in view of the report of the council, or from his own practical acquaintance, shall reject or admit the candidates.

**ART. 6.** Should the governor and council not agree on the question, whether the ecclesiastic or ecclesiastics proposed are dangerous persons, the affirmative shall prevail.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, the 17th of January, 1828.

[The same Signers.]

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#### DECREE No. 42.

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** Pauses for chanting the responses in funeral processions are hereby prohibited in the state.

**ART. 2.** Church festivals solemnised in the towns to Patron Saints (in effigy) or other images, shall not be effected through captains or festival officers appointed by any authority or person.

**ART. 3.** Festivals made hereafter shall be by those persons who voluntarily choose, and shall not be preceded by any invitation.

**ART. 4.** Exhortations made by curates in the pulpit to their parishioners, shall not be construed as a prohibited invitation.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 22d of January, 1828.

[The same Signers.]



## DECREE No. 43.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The inhabitants of the new Texas colonies, and of every other town whatever hereafter founded in the state, shall be exempted from complying with the stamped paper law for the term of ten years, as provided in article 32 of the colonisation law of the 24th of March, 1825, except as regards titles to property and the formation of the books of each town, which shall be executed on the corresponding paper.

ART. 2. Said term shall be reckoned from the time the new towns are founded, and with respect to those founded prior to the colonisation law, from the publication of this decree.

ART. 3. The inhabitants of the towns mentioned in the foregoing articles, may use common paper, except in those cases to which the last part of article 1 refers, and the documents and all kinds of instruments, public and private, shall not be thereby rendered invalid or illegal, but they shall accomplish all the purposes for which they were intended.

ART. 4. Persons herein favored shall enjoy the aforesaid privilege only in those towns to which it is granted; in other parts of the state they shall use stamped paper the same as other citizens.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 9th of February, 1828.

JOSE I. SANCHES, *President.*

JOSE M. ARTIA, *Dep. Sec'y.*

JOSE MARIA ECHAIS, *Dep. Sec'y.*

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DECREE No. 44.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The town of Gigedo shall for the present be the capital of the district of Rio Grande, without detriment to any arrangement made when the mail route through that quarter shall be changed.

ART. 2. All subordinate district chiefs hereafter appointed, who do not belong to the town assigned them for their future residence, shall receive 400 dollars per annum besides their present salary, and in all cases they shall be allowed one hundred and fifty dollars over the amount designated by article 85 of the financial regulations of the towns for expense of clerk and paper.

ART. 3. The executive shall proceed, according to his powers, to have the mail route established through the towns of Gigedo, Allende, Morelos, Rosas, Nava, and Guerrero; also to have the post, of the

time he spends in Rosas, make one day's stay in Gigedo to collect all the letters, in order that they may have a better conveyance.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 21st of February, 1828.

JOSE I. SANCHES, *President.*

JOSE A. NAVARRO, *Dep. Sec'y; Sup.*

JOSE MARIA ECHAIS, *Dep. Sec'y.*

DECREE No. 45.

The Congress of the state of Coahuila and Texas has thought proper to decree as follows:

Should the election of any citizen for municipal charges become vacant, or not go into effect from illegality, or physical or moral impediment, new electoral meetings shall be holden, provided there be no other person chosen by any number of votes.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 21st of February, 1828.

[The same Signers.]

DECREE No. 46.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Exclusive privilege is hereby granted to John Lucio Woodbury and John Cameron, for the term of twenty-three years, reckoned from the publication of this decree, for working Iron and Coal mines in the state.

ART. 2. Within the aforementioned term, no person shall be engaged in working said mines without permission from said Woodbury and Cameron, with the exception of mines discovered and legally specified and claimed previous to the promulgation of this decree.

ART. 3. Should the persons aforesaid, at the expiration of the three first years from the concession, not have introduced the machinery and necessary utensils, and erected, in one of the departments of Coahuila and Texas at least, the proper buildings for working and elaborating the iron, they shall forfeit the privilege.

ART. 4. The persons to whom said privilege is granted may introduce professed artists for smelting or separating the metal; for common mining laborers they shall prefer the natives of the country.

ART. 5. The price of iron, of no regular shape and of superior quality, shall not exceed in the state five-eighths of a rial the pound.

ART. 6. The aforementioned persons shall undertake their labors agreeably to the mining ordinances, and at the close of twenty-three years, the term of the privilege granted them, all the mines shall be

open to claim agreeably to the laws that are now or shall be hereafter enacted on the subject.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 25th of February, 1828.

JOSE I. SANCHES, *President.*

JOSE M. ARTIA, *Dep. Sec'y.*

JOSE A. NAVARRO, *Dep. Sec'y, Sup.*

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#### DECREE No. 47.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. His excellency general Vicente Guerrero, who by his bravery has earned a name among his country's worthies, and his excellency general Manuel Gomez Pedraza, the present secretary of war, are hereby declared citizens of Coahuila and Texas.

ART. 2. The bust of the former shall be placed in the hall of sessions of congress, at the right of the president's chair, and upon the pedestal the following shall be inscribed in letters of gold:—*Memento of the gratitude of the first constitutional congress to the immortal Vicente Guerrero.*

ART. 3. The executive shall order the provision of the foregoing article to be accomplished as early as possible.

ART. 4. The state of Coahuila and Texas gratefully acknowledges the important and signal services rendered by these illustrious military officers during the occurrences at Tulancingo.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 16th of March, 1828.

JOSE A. TIJERINA, *President.*

JOSE MARIA ECHAIS, *Dep. Sec'y.*

JOSE F. MADERO, *Dep. Secretary.*

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#### DECREE No. 48.

##### Rules of the Executive Council.

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#### DECREE No. 49.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The exclusive privilege of introducing boats, propelled by steam or horse power, in that portion of the Rio del Norte that

belongs to the state, is hereby granted to John Davis Bradbourn, and Stephen M. C. L. Staples for the term of fifteen years, provided they render said river navigable at their own expense.

ART. 2. The enjoyment of said privilege shall commence from the time the aforementioned boats are first introduced.

ART. 3. During the said term of fifteen years, no private tax, such as it is in the power of the state to levy on steam or horse boats, shall be laid upon those belonging to the aforesaid undertakers, who, during the said term, shall be subject only to such taxes as are now or shall be hereafter established by general laws upon all vessels arriving in the ports of the republic.

ART. 4. The empresarios, to whom the foregoing privilege is granted, may transfer the same, notifying the executive department of the state, and provided the persons to whom the transfer is made do not belong to a nation at war with the Republic of Mexico.

ART. 5. The aforesaid empresarios, of themselves, or through others, may colonise upon the borders of the aforementioned river all those lands belonging to the state which they consider necessary for establishing their own safety, and aiding themselves with timber and other utensils suitable for purposes of navigation, conforming to the general and private colonisation laws.

ART. 6. Meanwhile, the undertakers examine the aforementioned river to ascertain whether it be susceptible of navigation, wholly or in part, the executive, by means of the subordinate authorities, shall afford them all the protection within the compass of his powers, and shall interest himself and obtain from the general government, by request, that they be furnished with such military aid as their personal safety requires.

ART. 7. Should the said empresarios, or the persons acting in their stead, not fulfil their stipulation to put the navigation of the aforementioned river in successful operation in the term of two years, reckoned from the publication of this decree, they shall forfeit the rights granted them herein.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 12th of April, 1828.

JOSE M. CARDENAS, *President.*

JOSE F. MADERO, *Dep. Sec'y.*

NEPOMUCENO V. RÉCIO, *Dep. Sec'y.*

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### DECREE No. 50.

The Congress of the state of Coahuila and Texas, viewing the embarrassments of the state treasury from want of funds to meet the most urgent expenses, and wishing furthermore to prevent the difficulties that would result to the state authorities from their limited means, and even to the treasury itself in the event the

necessary expenses are not strictly and punctually paid with its existing funds, has thought proper to decree :

ART. 1. The office of councillor is hereby suspended for the present, until the state is able to defray the expense thereof; and the executive, in so far as it is his duty to consult the council, shall proceed of himself, availing himself of the aid of the standing deputation during the recess of congress.

ART. 2. The vice governor shall receive pay only when he officiates on account of death, sickness, or absence on the part of the governor, and, while he is repairing to the capital, should he not belong there, the acting president of the tribunal of justice shall discharge the duties of governor, providing a substitute to exercise his judicial functions agreeably to the law regulating the administration of justice.

ART. 3. The establishment of a treasury is hereby suspended for the present until the state has sufficient funds; the regulation and distribution of its expenses continuing as heretofore, with the appointment of an additional clerk to assist exclusively in the accounts of this department.

ART. 4. The department and district chiefs, except the one in Texas, are likewise hereby suspended for the present in the exercise of their functions, and the ayuntamientos of each shall communicate directly with the executive through the channel of the first alcalde.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 17th of April, 1828.

[The same Signers.]

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#### DECREE No. 51.

Rules for the internal administration of the supreme tribunal of justice.

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#### DECREE No. 52.

The Congress of the state of Coahuila and Texas, in consideration of the serious importance of some subjects pending, and wherein their decision is imperatively demanded, and exercising the power conferred by article 87 of the Constitution, decrees:

The present sessions are hereby prolonged the time required for coming to a proper decision upon the occurrences that have arisen from Decree No. 50, attending in the mean time to such other subjects in the secretary's office of congress as are entitled to the preference.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 19th of April, 1828.

RAMON GARCIA ROJAS, *President.*  
NEPOMUCENO VALDES, *Dep. Sec'y.*  
MIGUEL ARCINEAGA, *Dep. Sec'y.*

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DECREE No. 53.

The Congress of the state of Coahuila and Texas has thought proper to decree:

Substitute deputies may hold any municipal office whatever of popular choice, and shall be replaced therein whenever they are called to discharge their duties in congress in preference.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in Saltillo, on the 30th of April, 1828.

[The same Signers.]

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DECREE No. 54.

FEE BILL FOR NOTARIES.

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DECREE No. 55.

The Congress of the state of Coahuila and Texas, in attention to the prudent doubt proposed by the second alcalde of this city, and with a view to facilitate the progress of business without delay or injury to reconciliation in the subjects that occur, has decreed as follows:

ART. 1. Every citizen of Coahuila and Texas, when chosen, and having no legal impediment in the opinion of the alcalde, shall be obligated to serve as a colleague judge in the inferior courts of justice.

ART. 2. Any person who shall refuse to comply with the provision of the preceding article, shall incur a fine of from one to twenty-five dollars, according to the opinion of the judge, to be appropriated to the funds for public instruction; and the payment of the said fine shall not affect his obligation to comply with the charge conferred.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 3d of May, 1828.

[The same Signers.]

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DECREE No. 56.

The Congress of the state of Coahuila and Texas, attending to the deficiency of working men to give activity to agriculture and the other arts, and desiring to facilitate their introduction into the State, as well as the growth and prosperity of the said branches, has thought proper to decree:

All contracts not in opposition to the laws of the state, that have been entered into in foreign countries, between emigrants who come to settle in this state, or between the inhabitants thereof, and the servants and day laborers or working men whom they introduce, are hereby guaranteed to be valid in said state.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 5th of May, 1828.

[The same Signers.]

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#### DECREE No. 57.

The Congress of the State of Coahuila and Texas, having considered the error committed in the secretary's office on communicating the Decree No. 48, in article 43 thereof, has thought proper to rectify said article in the manner it was approved, which is as follows:

ART. 43. Should one of the voters of the council preside at any of said ballotings on account of the death, or any other legal cause on the part of the original president, and there should not be a majority of vote, the balloting shall be suspended until the next ordinary session, when it shall be repeated once only, and should there still be a tie, it shall be decided by lot. To decide by lot, slips shall be cut precisely alike, whereon the names that are to be drawn shall be written by the secretary in presence of the president: and the tickets, having been folded alike and placed in an urn, shall be drawn by the officer of the secretary's office.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 6th of May, 1828.

[The same Signers.]

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#### DECREE No. 58.

Regulations of the local militia of the state.

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#### DECREE No. 59.

The Congress of the state of Coahuila and Texas, anxious to facilitate the governor of the state with the means of aiding the national executive; in the critical circumstances in which he is placed, to repel the invasion preparing in Havanna by the tyrannical king of Spain for the re-conquest of Mexico, has thought proper to decree:

ART. 1. The executive is hereby authorised to negotiate with the governors of the mître of Nuevo Leon, and Durango, a loan of the amount in coin pertaining to the funds for maintenance and repairs

and belonging to the Parish Churches in the state, and that belonging to the confraternities and other charitable establishments, without detriment to religious worship in the former, or to the fulfilment of the objects of the latter.

ART. 2. The amount of the confraternities and other pious legacies, mentioned in article 140 of law No. 37, and which therefore pertains to the ayuntamientos, shall be annexed to the funds of the state.

ART. 3. So much of said funds, and those mentioned in article 1, as is taken upon rent redeemable at any time, shall be taken by the state in the same manner.

ART. 4. The executive shall request of all the ayuntamientos an exact account of all the laical deposits in their respective municipalities, and the same being collected within a prudential and preremptory term, he shall cause them to be added to the funds of the state, which insures the said funds as well as all the others in the manner herein specified.

ART. 5. The state hereby guarantees the loans, deposits, and capitals, which it receives upon rent, with its present rents and the proceeds of the lands granted to the colonists.

ART. 6. The executive is also hereby authorised to open, through the proper channels, a subscription or voluntary donation, embracing all classes, sexes, and corporations; admitting, in lieu of money, property of every kind, or jewels that may be offered by females; taking care that the different kinds of property be turned into money, and to receive a list of the donors, shewing their donations; also, an account of the proceeds thereof, with the proper vouchers.

ART. 7. The executive shall place the result of these means at the disposal of the general government, notifying congress of the amount, and shall faithfully and punctually discharge the payments of interest and the capital which he receives in this manner by way of loan.

ART. 8. Ayuntamientos which from omission, or any other cause, give occasion for frauds in concealing, or retarding the delivery of the aforementioned sums, shall be answerable with their own property, and should that not be sufficient, shall be suspended in the enjoyment of the rights of citizens for a term not exceeding three years.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of May, 1828.

[The same Signers.]

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### DECREE No. 60.

The Congress of the state of Coahuila and Texas has thought proper to decree:

All judicial subjects and suits instituted against securities situated



in the state, shall be concluded in all their processes in the courts of the state.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 14th of May, 1828.

[The same Signers.]

Returned by the governor on the 1st of September, 1829, and being reconsidered during the sessions of 1829, was rejected on the 4th of May of that year.

### DECREE No. 61.

The Congress of the state of Coahuila and Texas, having considered the subject proposed by the executive, bearing date the 2d of April last, relative to elucidating article 3 of Law No. 38, and desirous that the explanation may embrace other points, wherein it might be thought to conflict with the general law of the 20th of December last, has thought proper to decree:

**ART. 1.** When any transient Spaniard arrives at any place in the state, and from moral or physical impediments is, in the opinion of the executive, unable to proceed on his journey, he may remain for such a length of time as the executive shall deem proper.

**ART. 2.** Spaniards not comprised in the general law of exile of the 20th of December last, or in the private laws issued to the same effect by different states of the republic, after proving the same, shall not be considered transient according to the meaning of article 3 of decree No. 38, and those in the former case shall show furthermore that they have taken the oath prescribed in article 16 of the aforementioned general law.

**ART. 3.** Although the Spaniards mentioned in the foregoing article may remain in the state such time as the executive shall think proper, to attend to their business and pursuits, such residence shall not give them the right of domicile, nor shall they acquire thereby any civil or political rights, so long as Spain shall not acknowledge the independence of the republic.

**ART. 4.** The Spaniards mentioned in the two foregoing articles, during the time they remain in the state, shall submit to the measures of policy contained in decree No. 38.

**ART. 5.** The executive is hereby authorised to banish from the state all Spaniards who may remain therein agreeably to this decree, should he, after receiving a report from the local authority of the place of their residence, consider them dangerous persons.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 15th of May, 1828.

[The same Signers.]

DECREE No. 62.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Article 39, of the colonisation law, so far as it provides that commissioners shall be paid agreeably to the last fee bill of the ancient court of oyer and terminer of Mexico, shall be without value or force, and the provision of said article for designating the pay of surveyors, and manner it shall be done, shall be observed.

ART. 2. Said commissioners shall receive as a compensation for their labors in the ratio of fifteen dollars for every sitio of grazing land they distribute; two dollars for each labor of temporal land; and twenty rials for each labor of irrigable land, to be paid by the same families of settlers to whom the lands are awarded; and the said families shall be free from every other burthen on the part of the commissioner, with the exception of the stamped paper, required for issuing their titles, and the formation of the respective books, which shall be at their expense.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 15th of May, 1828.

[The same Signers.]

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DECREE No. 63.

The Congress of the State of Coahuila and Texas, has thought proper to decree:

Without augmenting the twenty-three years privilege, which by article 1, of Decree No. 46, was granted to Jno. L. Woodbury and Jno. Cameron, for working iron and coal mines, the term prefixed by art. 3, of said decree, for them to introduce and set up the machines, and build workshops for separating the metal, is hereby prolonged them another year.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 22<sup>d</sup> of September, 1828.

JOSE I. SANCHES, *President.*

JOSE M. ARTIA, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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DECREE No. 64.

The Congress of the state of Coahuila and Texas, in fulfilment of the provision of article 78 of the Constitution, has thought proper to decree as follows:

ART. 1. The city of Monclova is hereby declared the capital of the state of Coahuila and Texas.

**ART. 2.** The executive shall make proper provision for the future congress to meet in the capital.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 25th of September, 1828.

[The same Signers.]

**EXECUTIVE DEPARTMENT OF THE STATE }  
OF COAHUILA AND TEXAS. }**

The governor of the state of Coahuila and Texas to all the inhabitants thereof: Be it known that the Congress of said state has decreed as follows:

**DECREE No. 65.**

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** All persons under criminal suit for simple homicide, where the prosecution is not urged by a third person, shall be set at liberty, and where it is, this pardon shall be understood only with respect to corporal punishment.

**ART. 2.** Those whose crime, according to the aggregate of the preparatory proceedings after the legal evidence is rendered, is not clearly shown, shall likewise be set at liberty.

**ART. 3.** Those accused of treason, of any kind of sacrilege, revolutionary persons under any pretence, and those sentenced to mere pecuniary penalties to indemnify a third person, shall be excluded from this pardon.

**ART. 4.** This pardon shall cease in thirty days from the publication of this law in the respective district capitals.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 25th of September, 1828.

JOSE I. SANCHES, *President.*

JOSE M. ARTIA, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

Wherefore I command it to be printed, published, circulated and duly fulfilled.

Leona Vicario, September 26th, 1828.

JOSE MARIA VIESCA.

JUAN ANTONIO PADILLA, Secretary.

**DECREE No. 66.**

The Congress of the state of Coahuila and Texas has thought proper to decree:

The deficiency of the time of practice required by law for being admitted as a counsellor, on the part of Eleuterion Maria de la Garza, is hereby dispensed with.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 27th of September, 1828.

[The same Signers.]

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DECREE No. 67.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Debts contracted by hired servants with their masters, previous to the publication of this law, shall be paid in the manner and form they have bargained.

ART. 2. In future when a servant obtains employment, the contract he makes with his master shall be set down at the head of the account, wherein shall be manifested the manner he is to pay the debt he contracts; the agreement shall be authenticated by two witnesses, and signed by the same, the master, the servant if he can write, or another person in his name.

ART. 3. To rescind the contract mentioned in the foregoing article, the agreement of the parties shall be required.

ART. 4. Amounts ministered to servants, in part payment for their labor, shall be in money, or effects not exceeding the ordinary prices of the market; and both master and servant shall be entirely free, the one to furnish, and the other to accept.

ART. 5. In future no payment shall be made in advance to exceed what the servant can obtain as the reward of labor with the whole of one year's wages. Debts now pending, and supplies furnished to servants in their own sickness, or that of their families, shall be excepted from the provision of this article.

ART. 6. To idiotic servants no payment shall be made in advance exceeding ten dollars, without the knowledge of the alcalde, or a person of known probity.

ART. 7. The master shall show the servant his account as often as requested, and the latter may sue the former before the alcalde, when he thinks himself aggrieved by illegality or any other cause.

ART. 8. In haciendas, agricultural ranchos, or any other establishments situated out of towns, masters, superintendants and stewards, are hereby authorised to punish servants who fail in the faithful fulfilment of their duties, or disobey their superior, by arrest not exceeding four days, or with shackles for the same length of time.

ART. 9. When the master enters a complaint to the alcalde, on account of the incorrigibility of the servant, the alcalde, may punish him with shackles, or other correctional penalties, to cause him to re-

turn to his duty; observing, in these cases, the provision of articles 2, 3, and 4, of the law regulating the administration of justice.

ART. 10. Should the servant sue the master for excessive chastisement, the alcalde shall terminate the suit after taking the course pointed out in the foregoing article, but shall not be permitted to exonerate the servant from the debt he owes his master.

ART. 11. The use of the whip for correcting servants shall for ever be prohibited.

ART. 12. The master shall furnish the servant during sickness, according to his class, and on account of his labor, with the necessary sustenance and medicine. Should it not be convenient for the master to provide the servant with his sustenance, the latter may request it of another person, in the understanding that the value thereof shall be paid as a privileged debt.

ART. 13. Copies of this law shall be posted in the public places in all the towns of the state, and upon the doors of the chief houses of the haciendas and ranchos of the same.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 30th of September, 1828.

JUAN A. GONZALES, *President.*

JOSE MORELOS ARTIA, *Dep. Sec'y.*

MIGUEL ARCINEAGA, *Dep. Sec'y.*

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#### DECREE No. 68.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The communications which, previous to Decree No. 50, were directed to the vice governor, and to the department and district chiefs, shall be transmitted, so long as they do not officiate, to the governor of the state, who shall preside all the acts the constitution prescribes to the former.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 30th of September, 1828.

[The same Signers.]

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#### DECREE No. 69.

The Congress of the state of Coahuila and Texas, hereby enacts the following as additional articles to Decree No. 58.

ART. 1. Of the corps and companies of local militia, assigned by article 9 of the regulations on the subject, as indispensable force of the state, one squadron of cavalry is hereby suppressed.

**ART. 2.** The fractions mentioned in articles from 16 to 21 of said regulations, may be organised not only in pickets, thirds, halves, and whole companies, as therein provided, but also in squadrons and battalions, should their number and force reach that required for forming said corps.

**ART. 3.** The requisite of being a Mexican by birth to discharge the duties of militia officer is hereby abolished.

**ART. 4.** The civil functionaries, mentioned in exception fourth of article 95, shall be the public officers, civil and political, of the state; of whatever character, station office or trust, during their continuance in office.

**ART. 5.** The form of the oath which constitutes the substance of article 113, shall be reduced to the following:—You solemnly swear, in the presence of God, to use the arms, the country places in your hands, in defence of her independence, of the constitution of the republic, and that of the state.

**ART. 6.** To the oath taken by the soldiers the following words shall be added, “faithfully to obey the officers you have chosen, and to respect the lawfully constituted authorities.”

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 30th of September, 1828.

[The same Signers.]

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### DECREE No. 70.

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** The lands acquired by virtue of the colonisation law, whether general laws of the republic or private laws of the state, by native or foreign colonists, and by empresarios, shall not be subject to the payment of debts contracted previous to the acquisition of said lands from whatever source the said debts originate or proceed.

**ART. 2.** Until after the expiration of twelve years from having held legal possession, the colonists and empresarios cannot be sued, or incommoded by the judges, on account of said debts.

**ART. 3.** After the expiration of the term prefixed in the foregoing article, although they may be sued for said debts, they shall not be obligated to pay them in lands, implements of husbandry, or tools of their trade or machines, but expressly in fruits or money in a manner not to affect their attention to their families, to their husbandry, or art they profess.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of January, 1829.

[The names of the signers not mentioned in the book.]

## DECREE No. 71.

The Congress of the state of Coahuila and Texas, having attended to various difficulties, manifested by different ayuntamientos through the channel of the executive, in strictly complying with article 143 of the financial regulations of the towns, and wishing on their part to prevent all doubt in relation to said articles, in explanation thereof has thought proper to decree:

ART. 1. The ayuntamientos, on the receipt of this decree, with the concurrence of the curate of each town, shall proceed to comply with the provision of article 142 of the law No. 37, of the 1<sup>th</sup> of June, 1827, examining the documents in order to investigate the manner of establishment of the funds of the confraternities and other charitable legacies mentioned in said article; should they find the same to be legal, they shall comply with the provision of said article.

ART. 2. The parish curates shall be obligated to present the bonds or instruments of establishment immediately; and should they refuse to do so within the peremptory term of thirty days, after being notified by the first or by the sole alcalde of each town, the ayuntamiento shall set aside the establishment as having taken place in an illegal manner: and shall provide that the funds of the confraternities, or other funds established for pious purposes, the instruments of establishment or legacy whereof are not presented, or do not appear, be immediately placed with their municipal funds; and the plea of their having been lost, or misplaced, shall be of no avail.

ART. 3. The term of one year shall be granted to parish curates to present therein the accrediting documents of the confraternities, or charitable legacies, the funds whereof are taken by the ayuntamientos by virtue of the preceding article; and should it appear by said documents that the donation or legacy is legally founded, the funds that have been taken shall be restrained.

ART. 4. Should any dispute arise from the presentation of these instruments or titles, relative to the establishment of the confraternities or legacies, between the parish curate and the ayuntamiento, the one sustaining that they are legal, and the other that they are not, the respective judicial record shall be drawn, expressing the grounds each one has for sustaining his object and pretension, and forwarding through the channel of the alcalde to the assessor general of the state, for him to decide thereon according to law.

ART. 5. From said decision an appeal may be had to the tribunal of justice, conceded, as the case may be, by the law No. 39, of the 21<sup>st</sup> of June, 1827, regulating the administration of justice.

ART. 6. The expense incurred by the ayuntamiento in these cases shall be defrayed out of the municipal funds after the account is legally proved.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 21<sup>st</sup> of January, 1829.

DECREE No. 72.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The expression, *until congress appoints another*, contained in article 69 of the organic law for the administration of justice, shall be understood only in relation to the death of the officers *proper*, mentioned in the same article.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 29th of January, 1829.

DECREE No. 73.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The fortress of La Bahia del Espiritu Santo, in the department of Texas, may be called the town of *Goliad*.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 4th of February, 1829.

DECREE No. 74.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Every military man, retired from service, receiving pay for his services, and having no other occupation or emolument in the state, shall be exonerated from paying the assessment, which, as exempt from the service of the civic militia he is required to pay, agreeably to article 98 of the law on the subject, No. 53, regulating the civic militia of the state.

ART. 2. The military men retired from service, mentioned in the preceding article, who follow any industrious pursuit, or possess any kind of property besides the pay allowed to those of their class, shall be obligated to pay the tax designated in the aforementioned article 98.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 4th of February, 1829.

DECREE No. 75.

The Congress of the state of Coahuila and Texas, has thought proper to decree as follows:



James Power is hereby declared a citizen of the state; in pursuance thereof, the executive shall order the letter of citizenship to be issued in his favor.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 6th of February, 1829.

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#### DECREE No. 76.

The Congress of the state of Coahuila and Texas, in attention to the difficulties manifested by the tribunal of justice, with regard to the true construction of article 4, law No. 25, of the 22d of October 1827, has decreed as follows:

The voice of *alcalde*, which article 4, law No. 25, of the 22d of October, comprises, shall have reference to the judicial acts wherein said functionaries take cognisance as primary judges.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 6th of February, 1829.

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#### DECREE No. 77.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The executive with the concurrence of the ecclesiastical authority of the state shall proceed to request, as an aid, of the bishops of the republic, the secular or regular ecclesiastics required for curates in the new towns of the department of Texas.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 12th of February, 1829.

JOSE M. CARDENAS, *President.*

JOSE I. SANCHES, *Dep. Sec'y.*

JUAN N. DE LA PENA, *Dep. Sec'y.*

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#### DECREE No. 78.

The Congress of the state of Coahuila and Texas has thought proper to decree:

Two years in addition to the term assigned by article 8 of the colonisation law of the 24th of March, 1825, are hereby granted to John L. Woodbury to enable him to carry into effect the contract ratified with the executive of the state on the 14th of November, 1826.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 12th of February, 1829.  
[The same Signers.]

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DECREE No. 79.

The Congress of the state of Coahuila and Texas decrees the following as additional articles to Decree No. 3, of the 31st of July, 1827.

ART. 1. The two per cent. established by Decree No. 3, on the exportation of coin, shall be paid, whatever be the amount exported.

ART. 2. The amount which the alcaldes and officers, in whose presence the aforementioned payment shall be made, agree and determine upon as necessary for travelling expenses, shall be excepted from the payment aforesaid.

ART. 3. The sum excepted may be from one to three hundred dollars, which it shall not exceed; and the passport, required by article 7 of the aforementioned law, shall be previously obtained.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario on the 26th of February, 1829.

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DECREE No. 80.

The Congress of the state of Coahuila and Texas, to explain some doubts that have been agitated relative to the true meaning of Decree No. 28, of the 2d of November, 1827, has thought proper to decree the following as additional articles to the aforementioned decree.

ART. 1. The twenty-five dollars fine, imposed on smugglers of tobacco by article 2 of Decree No. 28, shall be added to the state rents.

ART. 2. The reward, designated by article 3 of the aforesaid decree, shall be delivered entire to the informer when the tobacco to be burned exceeds sixty-two and a half pounds, and should the tobacco seized be a less quantity, he shall be rewarded with eight dollars, also out of the funds of the state.

ART. 3. The course provided in article 4 of the aforementioned decree, for investigating the crime of smuggling and inflicting the punishment prescribed, shall be that marked out by Decree No. 7, relative to thieves; the duties to be determined by the alcalde, agreeably to article 8 of the confiscation compact, circulated on the 6th of December, 1822, should the value of the tobacco permit; and if not, the proceedings shall be conducted officially.

ART. 4. Receivers of smuggled tobacco shall be subject to the same

trials and penalties as smugglers, and each one shall suffer them of himself, whatever be the number.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 26th of February, 1829.

[The same Signers.]

### DECREE No. 81.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Permission is hereby granted to establish in this city a confraternity, styled Santo Entierro.

ART. 2. A set of internal regulations shall be drawn up, which through the channel of the executive, shall be transmitted to congress for approval.

ART. 3. A scheme reducing the contributions of the brothers to a regular co-operation, regulating the manner of their collection, custody and distribution: also the attendance on public ceremonies, and appointing the periods for the meetings, shall constitute the basis of these regulations.

ART. 4. The meetings of the members of the confraternity shall always be public, and shall be presided by one of the *alcaldes*, or by the *regidor*, whom the *ayuntamiento* shall designate.

ART. 5. No civil or political subject shall be agitated in said meetings, nor shall it be permitted to molest those who do not join the confraternity, or who belong to another, and under no pretence shall scapularies, girdles, or any thing else called relics (of saints) be established.

ART. 6. Members who avail themselves of the occasion of the meetings to promote the discussion of civil or political subjects, shall incur the penalties prescribed in article 2, of the decree of the general congress of the 25th of October, 1828.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 12th of March, 1829.

RAFAEL MANCHOLA, *President*.

JUAN N. de la PENA, *Dep. Sec'y*.

JOSE MARIA ARAGON, *Dep. Sec'y*.

### DECREE No. 82.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. A rent of two hundred dollars per annum shall be paid for a building, to be occupied by the agency of the state revenue.

ART. 3. Said rent shall commence from the time the building, which the community may furnish, shall be opened as a custom house—the building to be sufficiently large for depositing therein all kinds of cargo that may have to be delayed from any cause, or for which the duties are not paid.

ART. 3. Every half mule load, of whatever kind, size and condition, that shall remain deposited in the custom house over five days, on being removed, shall pay one, two and three quarter rials storage, agreeably to the following rule: a half load, the value whereof does not exceed from one to thirty dollars, shall pay one quarter rial; from thirty to one hundred, two; and exceeding that amount, three quarter rials.

ART. 4. After the completion of the first five days mentioned in the preceding article, the cargo that remains in the custom house shall be taxed at the rate of two quarter rials a month, storage.

ART. 5. In a separate book the agency shall keep an account of the product of the aforementioned storage, specifying the partial or separate amounts thereof.

ART. 6. The owners of cargo consisting of wool, brown sugar, cotton, hides and salt, that cannot be deposited in the custom house for want of space, shall be permitted to store the same in private houses, previously furnishing the respective bill of lading, and security for the duties.

ART. 7. Cargo, that is not deposited in the custom house for the reasons mentioned in the preceding article, shall be exempted from paying tax of storage.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 14th of March, 1829.

[The same Signers.]

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### DECREE No. 83.

The Congress of the state of Coahuila and Texas, in view of the declining state of its internal trade, occasioned in a great measure by the influx of foreigners in the market, and wishing to prevent as far as possible the ruin of those of their constituents who follow this pursuit, and find business to be paralysed; also to give an impulse to their trade, has thought proper to decree as follows:

ART. 1. For the present, and until congress shall regulate commerce with foreign nations generally, merchants coming from those, which have not ratified treaties with Mexico, shall be prohibited from retailing goods in any town in the state; being permitted to sell at wholesale only, for cash or on credit.

ART. 2. Individuals from nations with which Mexico has ratified treaties, proving to the local authorities their origin, and that of the

merchandise they introduce, with the respective passports to the consuls-general of their own nation, and other documents the laws do now, or shall hereafter prescribe, shall be excepted from the provision of the preceding article.

ART. 3. The *alcaldes* and *empresarios* of the colonies of the state shall give the colonists in their respective limits a certificate for a limited and sufficient time, in order that they may be considered as Mexicans.

ART. 4. Those who, on commission or as clerks, retail the goods of any foreigner not favored in this law, shall be subject to the penalties it imposes on the transgressors, and may be informed against by any individual of the town, before the respective *alcalde*.

ART. 5. Any foreigner or native merchant, who shall transgress this law, shall incur a fine of five hundred dollars, which the *alcalde* of the respective municipality shall cause him to pay, with power to destine him six months to public works, if, after the corresponding investigation, he has not wherewith to satisfy the fine.

ART. 6. Said fines shall be paid to the informer, and to the funds of the *ayuntamiento* where they are collected, one hundred dollars each; the remainder to the funds of the state:—should no informer intervene, the part assigned such person shall belong to the *alcalde*, who conducts the case officially, and the costs shall be divided in proportion to the amount of each share of the fine.

ART. 7. This law shall go into effect in ninety days from its publication, and the local authorities shall be responsible for any unfaithfulness in the fulfilment thereof.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of *Leona Vicario*, on the 2d of April, 1829.

[The same Signers.]

Returned by the executive with his remarks thereon on the 2d of April, 1829, and being amended, was again transmitted, bearing No. 91, on the 13th of May of the same year.

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#### DECREE No. 84.

The Congress of the state of Coahuila and Texas has thought proper to decree the following as additional articles to the internal regulations, No. 32, of the 7th of April, 1827.

ART. 1. Congress shall appoint four secular persons from their own body, whose duty it shall be to sit as grand jury, one of whom shall not have a vote, and shall act as secretary.

ART. 2. The jury shall take notice of the grounds of the complaint or accusations, may hear the complainant to see if he has any further explanation to make, and shall furthermore make such legal

investigation as the same shall deem necessary for determining the fact.

ART. 3. The record being formed as promptly as possible, the jury shall cite the accused to hear his plea or answer, which shall be taken down by the secretary.

ART. 4. This step being concluded, the committee shall write their report, and notify congress therewith, which, appointing a day for discussion, shall summon the accused to appear, to give him an opportunity to make further explanation; and the accused then retiring, congress shall proceed to the discussion, in public or private session as the same shall agree, and shall declare whether there be a just cause of action.

ART. 5. Should congress resolve in the affirmative, all the antecedents shall be transmitted to the corresponding tribunal, for the same to act according to law.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 24th of March, 1829.

[The same Signers.]

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### DECREE No. 85.

The Congress of the state of Coahuila and Texas, has thought proper to decree:

ART. 1. The chief agent of the state excise rent is hereby authorised to contract equal payments at specific periods for the duties resulting from all effects, fruits and crops of the owners of haciendas, ranchos, and bakeries, which they introduce to be sold or manufactured in the towns not exempted from duties.

ART. 2. Said contracts shall commence from the publication of this decree, and be taken out so soon as a systematic plan of revenue is formed, to be renewed every year on the last of December, whether in augmentation or diminution of the respective monthly amount, as the agent shall judge proper.

ART. 3. The aforementioned contracts shall be written down in a book, to be kept for that purpose, and signed by the persons interested, and agents of the rents.

ART. 4. Contractors, against whom any abuse shall be proved, in permitting or authorising any effects to be introduced under their names shall be treated as thieves, and the fine and other penalties prescribed, as the case may be, by articles 1, 2, 3, 4 and 5, of law No. 7, shall be inflicted upon them as such.

ART. 5. The agents of the state rents shall be obligated to observe the two preceding articles, under their most rigid responsibility, and penalty of losing their office, should bribery, subornation, or any other partiality they exercise to the injury of the concerns they manage, be

proved against them—and shall furthermore be subject to the penalties they deserve according to the laws and circumstances.

ART. 6. The executive shall cause the agent to proceed immediately to collect the duties resulting from fruits, crops, flour, &c., introduced from the beginning of 1824, until the present by the owners of haciendas, ranchos, or bakeries, without effecting the corresponding payment according to law.

ART. 7. For the collection provided in the preceding article the agents of the rents shall conform, either to the amount of equal periodical payments established until the end of 1824, or to statements the persons interested shall present him with their signature, wherein the introductions they have made during the whole of this period shall be duly manifested.

ART. 8. The executive shall give notice to congress as soon as the duties in arrears are collected, manifesting the amount, endeavoring to do so before the close of the sessions.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 26th of March, 1829.

[The same Signers.]

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#### DECREE No. 86.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Debts contracted by servants, or by their masters with them, shall be paid in the manner and form they have bargained, with the exception of those of the following article.

ART. 2. Joint accounts between two or more servants, even should they be father and sons, are hereby absolutely prohibited, and those now in said form shall be settled on the publication of this law and the debt or credit resulting shall be divided among the individuals comprised in the account—in proportion to the wages they obtain for their labor, and in future the respective account of each shall be separately kept, agreeably to the provision of this law.

ART. 3. Masters shall take care in future to retain one-third of the wages of each of their servants, to be placed to their credit in their respective accounts, and they shall be exonerated from this retention, only in cases of serious sickness, or absolute nakedness of the servant and his family, when they shall be supplied with what is absolutely required.

ART. 4. Should there be any failure to comply with the provision of the preceding article, the transgressor shall be sentenced to lose the part he did not retain, which shall be placed to the credit of the servant.

ART. 5. Every servant who solicits employment, at the time of making his contract, shall present a paper proving the amount he then owes, also his conduct as a citizen and as a servant; said docu-

ment shall be signed, either by his former master, by the judge, or by a citizen of known probity. The debts shall be paid directly from master to master as they shall agree, it being prohibited only to be through the medium of the servant newly employed, without which requisites no bargain whatever shall be legal.

ART. 6. Contracts made between masters and servants shall be expressed in the plainest manner at the head of the respective accounts.

ART. 7. Grain or provisions promised to servants as rations shall be supplied them in the natural state or kind, without any alteration, and only when the master is sick shall they be charged with the value thereof—should the master not see fit to let them have it gratis.

ART. 8. Provisions or effects supplied to servants on account of their labor shall be charged at the current prices of the market.

ART. 9. The master who transgresses the preceding article, charging his servant an excessive price for what he supplies him, shall be fined five times the amount of his fraud, to be declared by the alcalde after proving the fact; one-fifth of the fine shall go to indemnify the servant, and the remainder shall be added to the municipal funds.

ART. 10. Minors shall be placed in employment by their respective parents, or relatives on whom they depend, the former having a right to the fruit of the labor of their children, and relatives to the management thereof without detriment to the subsistence of the minors.

ART. 11. Masters and superintendents may chastise their servants for any faults they commit, treating them in so doing in a parental manner.

ART. 12. Any person who transgresses the preceding article by excessive chastisement, shall be compelled to pay the damage agreeably to the result of a competent trial, summary or conciliatory, and shall furthermore be fined by the alcalde according to his attributes, and the seriousness of the case for the benefit of the municipal funds.

ART. 13. When the master enters a complaint against his servant for being an idler, incorrigible, obstinate and impertinent, the alcalde shall compel the servant to return to his duty, punishing him as he deserves, according to the circumstances of the offence.

ART. 14. A servant who leaves the service of his master in debt, or who, not being in debt, loses the concerns under his charge by negligence or omission, shall be tried according to articles 2, 3, 4 and 5, of law No. 7, should a complaint be entered against him.

ART. 15. Besides the annual settlement that shall be made in the accounts of the servants, they may require the master to show the same, when they intend to apply for any considerable amount, who shall acquaint them therewith.

ART. 16. When the servant wishes to leave the service of his master, without prejudice to the contract made, he may compel his master to settle the account, and to furnish him the document specified in article 5, and the master shall perform this duty within one month at the longest.

ART. 17. The action of servants against their masters in respect to



dues for their personal labor, shall be of an executive character, and shall have the preference conceded by law.

ART. 18. Masters shall not be obligated to pay the burial of their servants who die in debt, nor shall the families of the latter be required to do it when they possess no other property than what is required for their personal and domestic use.

ART. 19. When any servant in debt, and not possessing any other property than that excepted in the preceding article, has occasion to bury any of his family, the master shall not be obligated to supply him a greater amount than what is necessary to pay the fees of an ordinary burial, according to the rates of the diocess.

ART. 20. Debts of those who die in service shall be paid with the property they leave on their decease, and their children and relatives shall not be compelled in any other manner.

ART. 21. The local authorities in their jurisdiction, and under their strictest responsibility, shall watch over the punctual fulfilment of this law in all its parts.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 4th of April, 1829.

JOSE MARIA BALMASEDA, *President.*

JOSE MARIA ARAGON, *Dep. Sec'y.*

RAMON GARZIA ROXAS, *Dep. Sec'y.*

#### DECREE No. 87.

The Congress of the state of Coahuila and Texas, taking into view the importance of various subjects yet undecided, and whereon a resolution is imperatively demanded, in exercise of the privilege granted by article 87 of the constitution, decrees:

The sessions shall be prorogued another month.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 28th of April, 1829.

[The same Signers.]

#### DECREE No. 89.

The Congress of the state of Coahuila and Texas has thought proper to decree:

The first of the sole alcaldes of the district capitals, shall be the channels, through which the executive shall communicate the orders and decrees which on account of being circulars, are to be transmitted to all the towns of the state; on other subjects that offer the executive shall communicate directly with the alcaldes and ayuntamientos.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 29th of April, 1829.

JOSE M. CARDENAS, *President.*

RAMON GARCIA ROXAS, *Dep. Sec'y.*

MARIANO GARCIA, *Dep. Sec'y.*

DECREE No. 89.

The Congress of the State of Coahuila and Texas has thought proper to decree:

ART. 1. On the opening of the ordinary sessions the second term, the executive shall present to congress a nomination of three persons, well informed, and qualified to perform the general visit of ayuntamientos in the state.

ART. 2. The investiture and attributes of this officer, in the discharge of his commission, shall be those that belong to him as a delegate of the executive of the state.

ART. 3. The executive shall form the instructions, to which the person appointed shall conform, also proposing the salary to be given them, in order that, after the corresponding approval of congress, he may enter on the discharge of his commission.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 29th of April, 1829.

[The same Signers.]

DECREE No. 90.

The Congress of the state of Coahuila and Texas, taking into view the circumstances to which all the towns find themselves reduced to be able to support the public expenses, and that said expenses imperatively demand the dictation of some measures whereby they can be paid, such as are least burthensome to the citizens, exercising the ninth attribute conceded in the first part of article 97 of the constitution of the state, has thought proper to decree:

ART. 1. Every Coahuiltexian of whatever class or age, who has a rent, wages, salary, business or industrious personal pursuit, shall pay to the state annually such part of his income as corresponds to three days, from which assessment females shall be excepted.

ART. 2. This tax shall be paid by thirds of a year—one day's income every four months in advance—and that the collection of the quotas may be prompt by rendering the payment more easy, the ayuntamientos may subdivide them in such fractions as they think proper.

ART. 3. The graduation of said income shall be made by the person interested, computing what he earns one day with another, by his regular yearly earnings.

ART. 4. The ayuntamientos shall determine the quotas of the in-

dividuals of their respective municipality, declaring such as in their opinion are fraudulent from having been diminished by the persons interested—which shall be immediately subjected to the provision of the following article.

ART. 5. When any individual refuses to state what he thinks he earns daily, the ayuntamiento shall choose three persons, if possible, of the same occupation as the former, to make the graduation he conceals or refuses, and the same being made, the quota shall be exacted without admitting any claim to the contrary.

ART. 6. Individuals who besides their daily wages are furnished by their master or employer with board and lodging shall add for this reason, one and a-half rial more to their daily income, should they be domestic servants, and four rials, should they occupy a higher station; servants who receive raw rations shall be excepted from this augmentation.

ART. 7. Any one, who wishes to pay at once the amount of this tax for the year, shall be permitted to do so.

ART. 8. Every head of a family, and owner of a workshop, or hacienda shall deliver the payment, for himself, and those he employs permanently on salary or daily wages, taking the corresponding receipts.

ART. 9. Should any individual, after the formalities provided in articles 4 and 5, are concluded, refuse more than twice to pay the quota assigned him, he shall be compelled to pay a fine of triple the amount of his quota, besides the costs that may have resulted from the collection.

ART. 10. Should a person repeat the refusal he shall be fined the same amount specified in the foregoing article, and so often as he shall refuse to pay the tax.

ART. 11. Within the first month from the respective publication of this decree, the ayuntamientos shall form the lists of the persons assessed belonging to their municipality according to form No. 1, taking care to make the same in a book, of which a copy shall be transmitted to the executive at the end of the time prefixed.

ART. 12. The ayuntamientos shall choose an individual of their satisfaction and confidence for each ward in towns divided into such, and in those that are not, they shall distribute the commissions as is most practicable, for forming the lists and collecting the tax; and no person shall decline this charge.

ART. 13. The persons commissioned shall comply in every respect with the provision of this decree, giving notice to the ayuntamientos, to which they are answerable, of the statement pertaining to their trust.

ART. 14. For each tax the ayuntamientos shall deliver to the collectors two receipts, divided in three squares in the manner specified in form No. 2. One of said receipts shall be delivered to the person assessed, for the collector to sign the respective square each time said person delivers him the quota; and the other shall remain

in possession of the collector for the person assessed, either himself, his master or employer, or some other person at his request to sign the respective square, that the collector may show proof by this document on delivering what he has received.

ART. 15. The ayuntamientos every third of the year shall post in the most public places, lists of the persons taxed, belonging to their municipality, showing at the bottom those who deserve the penalties designated in articles 9 and 10.—Every citizen shall be authorised to enter a complaint to the ayuntamiento for faults he may notice in said lists in order to exact the respective responsibility, as the case may be.

ART. 16. With the exception of sons in a family, every individual over eighteen years of age, who maliciously wishes to withdraw himself from the payment, and for this reason is not comprised in the list shall be considered a vagrant and disorderly person, and subject to the provision of article 123 of Law No. 37.

ART. 17. In two months from the publication of this law in each municipality the first third of the assessment shall be collected, and the ayuntamientos shall deliver the product to the respective agents of the state rents, taking the corresponding receipt, and giving notice to the executive that this provision is executed.

ART. 18. The executive shall take care that on the first month of the third the ayuntamientos under their strictest responsibility pay over to the rent agencies all that should be collected of the preceding third, proving it not to have been more, by comparing the aforementioned lists, which shall be performed in this act, exacting the corresponding receipt, showing the amount they have delivered.

ART. 19. The agents shall forward every year to the executive, the last of December, an abstract or summary according to form No. 3, to be taken from the same lists with which the ayuntamiento collects the tax.

ART. 20. The executive shall compare each abstract with the census contained in the statistical record of each municipality, and not finding them to agree, shall demand the difference of the ayuntamientos of the towns where it happens, admonishing them in one and in two instances to proceed efficiently in their trust.

ART. 21. Should any ayuntamiento not make full payment on the second demand made by the executive, the latter shall fine the same according to his attributes, and the seriousness of the fault, the product of the fines to be added to the state rents.

ART. 22. Ten per cent. of said tax shall be assigned to the ayuntamientos, out of which the commissioners shall be compensated with three per cent. of what they respectively collect, and the seven per cent. remaining shall be appropriated to the expenses of collection, and benefit of the municipal funds.

ART. 23. The executive shall circulate this decree, accompanied by all the instructions necessary for the exact fulfilment thereof.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 4th of May, 1829.

[The same Signers.]

### FORM No. 1.

*Ward formed by — street, — number.*

Names of persons taxed.	Income.			Quota or tax for each third.		
	D.	R.	G.	D.	R.	G.
A. B.	8	0	0	8	0	0
—	0	4	6	0	4	6
—	0	2	0	0	0	2
—	0	2	10	0	2	10
—	0	3	0	0	3	0
<i>Hacienda.</i>						
Owner D. N. Resides.						
D. N. Superintendent,	4	0	0	4	0	0
N. Steward,	1	0	0	1	0	0
Servants in constant em- ployment.						
Servant,	0	3	0	0	3	0

### FORM No. 2.

A. B. paid his third of personal tax.  
 First third of year.      Second third do.      Last third do.

### FORM No. 3.

*Municipality of ———— Rent Office or Agency.*

Abstract and recapitulation of the number of persons assessed, and amount of the direct tax which this ayuntamiento has delivered to this agency, receiver's office, or clerk's office during the several thirds of the year of the date.

#### *First Third.*

Number of persons assessed.	Amounts.
Those of three dollars, 9	27 0 0
Of one, . 80	80 0 0
Of four rials, 280	140 0 0
<hr/> 369	<hr/> 247 0 0

*Second Third.*

Of three dollars,	12	36	0	0
One,	34	34	0	0
Four rials,	180	90	0	0
	<hr/>	<hr/>		
	226	160	0	0

*Last Third.*

Of three dollars,	18	54
One,	50	50
	<hr/>	<hr/>
	68	104

*Recapitulation.*

On the first third,	369	247
Second,	226	160
Last,	68	104
	<hr/>	<hr/>
	663	511

Deduct the ten per cent. assigned the ayuntamiento by Article 22 of the law on the subject.

511  
51   0   10

Nett in favor of the state,      459   7   2

**DECREE No. 91.**

The Congress of the state of Coahuila and Texas, taking into view the declining state of its internal trade, caused mostly by the arrival of foreigners in the market, and wishing to prevent as far as possible the ruin of those of their constituents who are engaged in this occupation, find their business rendered ineffectual, also to encourage their trade—has thought proper to decree as follows:

**ART. 1.** Foreign merchants, of whatever nation, not naturalised in the republic of Mexico, are hereby prohibited from retailing goods in any town in the state, being permitted to sell only at wholesale, for cash or on credit.

**ART. 2.** Also every foreigner, or native of the republic is hereby prohibited the introduction and sale of coarse cotton and woollen stuffs, not manufactured in the republic—natives being permitted to continue the sale of the goods of this kind they now have on hand.

**ART. 3.** The alcaldes and empresarios of the colonies of the state shall give the colonists of their respective limits, engaged in trade, a

certificate for a sufficient and limited time, that they may be considered as Mexicans.

ART. 4. The *alcaldes* of all the towns of the state shall likewise give certificates to those foreigners, who, besides obtaining letters of citizenship, have fixed their residence in any of the towns in their limits, should they request it on account of being engaged in trade.

ART. 5. Those who on commission, or as clerks, retail the goods of any foreigner, shall be subject to the penalties this law imposes on the offenders, and may be informed of by any individual of the town to the respective *alcalde*.

ART. 6. Any foreigner or native merchant, who transgresses this law, shall be fined five hundred dollars, which the *alcalde* of the respective municipality shall cause him to deliver, with authority to destine him six months to public works, should it appear on proper investigation that he has not the means to pay the fine.

ART. 7. Said fines shall be appropriated, one hundred dollars to the informer, one hundred to the funds of the *ayuntamiento* where they are collected, and the rest to those of the state. Should there be no informer, the part assigned for that purpose shall belong to the *alcalde* who conducts the official proceedings, and the costs shall be divided in proportion to the amount of each portion or share.

ART. 8. This law shall go into full effect in ninety days from its publication in the capital of each district, and the local authorities shall be answerable for any breach of trust in the fulfilment thereof.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of May, 1829.

[The same Signers.]

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#### DECREE No. 92.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. A school of mutual instruction, on the Lancastrian plan, shall be established in each department of the state.

ART. 2. Each of the said schools shall be situated in the respective capital of the department.

ART. 3. The teachers shall be engaged for three years, on solicitation of the executive, who, to admit them, shall be satisfied of their veracity, qualifications and general merit.

ART. 4. Each teacher shall take charge of the department that falls to his lot, and each shall receive eight hundred dollars per annum, payable monthly in advance.

ART. 5. Said establishments shall be composed of one hundred and fifty pupils each, and when they exceed this number, the teacher may request an increase of salary, drawing up a petition containing information on the part of the *ayuntamiento*, which, through the channel of the executive shall be presented to congress for their resolution.

ART. 6. The three teachers together shall form a set of regulations, to govern the schools, which being completed they shall present to the executive for his approbation; and when this is obtained the original shall be deposited in the archives, and a sufficient number of copies printed to be circulated to all the authorities of the state.

ART. 7. The teachers shall instruct the pupils in reading, writing, arithmetic, the dogma of the Catholic religion, and all Ackermann's catechisms of arts and sciences.

ART. 8. The ayuntamientos shall ascertain what children of the municipality are unable to pay, and whose parents wish to send them to school, but do not for want of means.

ART. 9. From among the said poor children the ayuntamiento shall take from one to five by lot, and send them to the establishment to be sustained by the municipal funds: where there are none such, a voluntary subscription shall be raised for that object; in either case one shall be sent without fail, to be taken always by lot. Said children shall be received gratis in the school, being furnished by the state with what articles they need for their instruction.

ART. 10. Also the children of these citizens in the department of Texas, who contributed to establish the present school fund of the capital, shall be admitted gratis, provided they continue paying the quota they agreed.

ART. 11. The ayuntamientos shall require citizens, who have the means, to send their children to the establishments, and with those who are obstinate in complying, whether from vicinity, negligence, or apathy, they shall take such measures as they consider to be just.

ART. 12. To support the expenses to be defrayed a fund shall be created in the capital of each department, to be under the charge of the respective ayuntamiento, with power to appoint a depository, from within or without their own board.

ART. 13. Said fund shall consist of the present school funds of the capital towns, to which shall be added the legacies intended for this object, the municipal quotas assigned, and the product of pay pupils in the respective schools.

ART. 14. Parents, who are able, shall pay for each of their children fourteen dollars per annum while learning the first rudiments, until they commence to write, and eighteen dollars the rest of the time until they leave the establishment.

ART. 15. The ayuntamiento shall be vigilant, that the collection of the sums assigned to this fund be exact, permitting no delay; and taking care that the parcels paid in be entered in a book that shall be formed in each capital for keeping the account of its respective establishment.

ART. 16. The special fund of each department shall be used in paying the teacher, house rent, market, and repair of school furniture, the amounts thus paid out to be proved by the teachers' receipts, authenticated by the certificate of the *sindico procurador* and the order of the *alcalde*.



ART. 17. When the fund of an establishment has not the means of promptly meeting any expense it shall be assisted by the funds of the municipality, to be restored; and should even these be exhausted, application shall be made for the aid of funds, to be restored, to the chief agents of the state rents, who shall supply what is necessary after the proper document is authenticated by the ayuntamiento.

ART. 18. Each pupil educated in the establishment, on leaving, shall pay the respective ayuntamiento the sum of ten dollars, to be called gratitude money, and with this a separate fund shall be formed, to be used to reward the teacher, with the understanding that it shall not be delivered to him until the conclusion of his contract, he being required to keep an exact account of the amount of said funds paid in, to correspond with that which shall be kept by the ayuntamiento.

ART. 19. The accounts of these funds shall be rendered to the executive at the close of each financial year, and shall be made out agreeably to the accompanying form.

ART. 20. The executive shall endeavor that this law have its full effect as soon as possible, and to establish the schools, he may dispose of the state rents to the amount of two thousand dollars, under the most strict account of the disposition thereof, which shall be no other than the purchase of all the furniture, slates and books, required for carrying into effect the object of this decree.

#### DEPARTMENT OF ——— LANCASTRIAN SCHOOL.

*Account of funds paid in and out of said institution during the financial year, commencing on the first of September, and ending on the day of the date.*

##### PAID IN.

Funds pertaining to the School of this city,	000 0 0
Charitable fund of ———, dedicated to the instruction of youth, - - -	000 0 0
Product of municipal quotas, dedicated to School funds, - - - - -	000 0 0
Balance on hand the close of the year preceding,	000 0 0
By four children during one year at 14 dollars,	560 0 0
ten do six months do	70 0 0
five do three months "	14 0 0
twenty-eight " one year, at 18 dollars,	504 0 0
nineteen do nine months at do	256 4 0
	<hr/> 1408 0 0

##### PAID OUT.

To the Teacher according to documents Nos. 1 and 2. - - - - -	800 0 0
For house rent, document No. 3, - - -	160 0 0
For slates, tables, benches, paper, &c., according to documents, Nos. 4, 5, &c., - - -	300 0 0
	<hr/> 1250 0 0
Balance on hand - - - - -	<hr/> 158 0 0

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of May, 1829.

[The same Signers.

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**DECREE No. 93.**

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** The executive is hereby authorised, subject to the approval of congress, to contract with private individuals, natives or foreigners, for the establishment of two panoptic prisons in the state.

**ART. 2.** Said prisons shall be situated in the department of Bexar, and district of Parras.

**ART. 3.** The cost of buildings, master tradesmen, tools, machines and other necessary apparatus, shall be at the expense and risk of the contractors, as well as the support and clothing of the delinquents placed therein.

**ART. 4.** They shall furthermore furnish the persons introduced who fulfil their term of sentence with thirty dollars as means and sufficient and necessary tools for carrying on their trade.

**ART. 5.** They shall also supply those belonging to a trade that requires two or more workmen with a loom or machine, allowing them hands, also delinquents, to assist them in the labor, and the contractor shall appoint such person as deserves his confidence as master of these small frames or looms.

**ART. 6.** Those who leave the prison agreeably to the provision of the two foregoing articles, shall establish themselves in the town they select previous to leaving, under immediate inspection of the local authorities of the place of their residence, to whom the contractor shall give seasonable notice.

**ART. 7.** The contractors at the end of every year shall publish a manifest, giving a detail of their prison, of the progress of the prisoners, and a minute account of the expenses and product of their undertaking, and the latter shall be subject to a counter examination.

**ART. 8.** At the expiration of the first contract, which shall be stipulated for five years, the available buildings shall remain for the benefit of the state.

**ART. 9.** The state pledges itself to the contractors to destine to their establishments one half of all the prisoners sentenced to fortresses or public works, and furthermore all vagrants designated in article 122, of Law No. 37.

**ART. 10.** The prisoners shall be employed by the contractor in whatever mechanical trade they like, endeavoring not to shift them from one trade to another before they are perfectly taught in that wherein they were first placed.

**ART. 11.** The product of the labor of the prisoners shall be for the

benefit of the contractor during the first two years from the first introduction of prisoners that takes place; and the profits of the last three years shall be divided between the state and the contractor.

ART. 12. The conducting of the prisoners to the prison shall be defrayed out of the state rents.

ART. 13. The executive in presence of the contractor of these establishments shall draw articles, regulating the contracts as he shall deem proper, not in opposition to this decree.

ART. 14. The state obligates itself punctually to fulfil the stipulations made in the contracts, provided they obtain the approval of congress.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of May, 1829.

[The same Signers.]

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#### DECREE No. 94.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The intervening officers, whom, by virtue of article 1, of the general tariff of maritime custom houses, the state should place in the ports of Galveston and Bahia de San Bernardo, shall be appointed by the executive, and approved by congress, without which the respective commission shall not be granted them for entering on the exercise of their functions.

ART. 2. The persons appointed to said stations shall present their commissions to the civil authority of the port, for which they are chosen, and before the same shall take the oath prescribed by article 220 of the constitution of the state.

ART. 3. For the present a salary of five hundred dollars per annum, shall be assigned these officers, without affecting the percentage received by the clerks or receivers of the respective ports.

ART. 4. The said officers shall comply as prescribed to intervening officers in the general custom house tariff, collecting the two rials tonnage duty pertaining to the state, giving notice to the executive of the product thereof every month, and taking charge of the performance of the duties with regard to the other state rents in the port of their residence.

ART. 5. Should the present clerks of the ports be appointed intervening officers, they shall deliver to those who succeed them all the chattels in their possession, adjusting their accounts up to the day they make the delivery, which they shall remit to their immediate superiors, accompanied by the funds they have on hand.

ART. 6. The executive shall give the respective orders for the salary of the intervening officers to be paid at the end of every month's service, dictating such measures as he shall deem seasonable for the exact fulfilment of this decree.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 13th of May, 1829.

[The same Signers.]

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DECREE No 95.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. The governor is hereby authorised to regulate the boundaries with the adjoining states.

ART. 2. The governor may cede any portion of the territory of the state, and admit in return another equal portion of the states adjoining, giving notice to congress, and during their recess, to the permanent deputation.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 15th of May, 1829.

[The same Signers.]

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DECREE No. 96.

The Congress of the state of Coahuila and Texas has thought proper to decree:

ART. 1. Decree No. 26 of the state legislature, is hereby declared without value or force, and in pursuance thereof permission is hereby granted to Juan Antonio Viesca to introduce and establish in the state a boring machine to cause water to flow spontaneously upon the surface.

ART. 2. The establishment of said machine shall not be effected on a person's own land should veins of water of the appurtenance of another be thereby intersected, nor on any other where the establishment results to the injury of a third person; and should the person interested be the cause, he shall be obligated to indemnify the party injured.

ART. 4. All persons are hereby prohibited from establishing this kind of machines for the term of four years from the publication of this law, without the previous consent of the person who enjoys the privilege.

ART. 5. Should the person to whom the privilege is granted not have introduced and established the said machine at the expiration of one year, he shall forfeit the exclusive privilege herein granted.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 27th of May, 1829.

[The same Signers.]

**DECREE No. 97.**

The Congress of the state of Coahuila and Texas has thought proper to decree:

The eighteen months deficiency for completing twenty-five years of age, on the part of Licentiate Maria Gorivar is hereby dispensed with, and in pursuance thereof he is hereby declared duly qualified to discharge all acts wherein the aforementioned age is required, with the exception of those specified in articles 36, 146 and 200 of the constitution.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 29th of May, 1829.  
[The same Signers.]

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**DECREE No. 98.**

Municipal Ordinances for the internal administration of the ayuntamiento of Bexar.

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**DECREE No. 99.**

Municipal Ordinances of the ayuntamiento of Goliad.

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**DECREE No. 100.**

Municipal Ordinances of the ayuntamiento of Austin.

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**DECREE No. 101.**

Municipal Ordinances of the ayuntamiento of Rosas.

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**DECREE No. 102.**

Internal regulations of the executive department of the state.

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**DECREE No. 103.**

The Congress of the state of Coahuila and Texas, taking into view the popular arrangement the constitution contemplated giving to the appointment of the magistrates of the tribunals of justice, and that the extension of the powers of the executive conferred in the eighth of his attributes might comprise the substitutes of long continuance, should they be appointed by him, has thought proper to decree as follows:

ART. 1. The substitutes of ministers of the tribunal of justice, and attorney general, whose continuance in office does not exceed one

year, shall be appointed by the executive of himself, according to article 69 of the law regulating the administration of justice.

ART. 2. The substitute of assessor general of the state shall also be appointed by the executive, observing the provision of the foregoing article.

ART. 3. Substitutes whose term exceeds one year shall be appointed by congress on nomination of three by the executive, who, in case of recess, shall appoint the substitutes comprised in the preceding articles until congress having convened, hears the nomination and determines the appointment, unless in case of sickness on the part of those officers comprised in this decree, whose term is one year, and whom the executive supposes will recover in one or two months, in which case he shall appoint a substitute to the appointment made by himself, by virtue of article 1.

ART. 4. The substitutes comprised in this decree shall be duly sworn before congress, and during the recess thereof, before the executive.

ART. 5. Since all provisional substitution that cannot be prolonged in case of death, except inasmuch as circumstances require, shall be comprised in the foregoing articles, the decree No. 72, is hereby repealed.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 30th of May, 1829.

JOSE MANUEL CARDENAS, *President.*

RAMON GARCIA ROJAS, *Dep. Sec'y.*

JOSE MARIA ARAGON, *Dep. Sec'y.*

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#### DECREE No. 104.

Letter of procedure.

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#### DECREE No. 105.

The Congress of the state of Coahuila and Texas, convened in extraordinary sessions, has thought proper to decree as follows:

ART. 1. Spaniards, unmarried, and widowers without children, who remain in the state, shall exhibit as forced loan one third of their capital; those married, without children, and widows with only one child, one fifth: and those of both, having more than one child, one eighth.

ART. 2. The capitals of Spaniards, who, under any pretext, accompanying the invading expedition, or reside in any of the Spanish dominions, shall be confiscated, and annexed to the state rents.

ART. 3. The capital of the Spaniards who are now in a friendly or neutral country, whether consisting in real securities, cash or goods, shall be sequestrated, and the latter sold by a depository, who shall deliver the proceeds of each to the respective agencies.

**ART. 4.** Those who have left their wives and children in the republic shall be excepted from the provision of the two foregoing articles, and be considered as comprised in article 1st.

**ART. 5.** The executive shall regulate the appointment of the depository, and the manner of receiving his accounts.

**ART. 6.** Every person, who, in any way favors any concealment of the property specified in this decree, shall be fined in the amount of the value concealed, and shall furthermore be banished ten years from the state, and any one who shall, directly or indirectly, co-operate in an effective manner in favor of the Spanish expedition, shall forfeit his life; for inflicting this and the foregoing penalties, the information of the fact, and previous opinion of the assessor shall suffice.

**ART. 7.** During the war, fifteen per cent. shall be deducted from the pay, or any other profit, nor more than one hundred, nor less than twenty-five dollars a month, received by all public officers of the state. From the pay of those who receive more, twenty per cent. shall be deducted; and in respect to those, who have voluntarily offered more than this article requires, only the former deduction shall be exacted.

**ART. 8.** During the Spanish invasion, the executive is hereby authorised to exercise the following powers—

*First.*—To assemble and place under arms so much force belonging to the civic militia of the state as can be paid with the funds mentioned in the foregoing articles, and means established in this law.

*Second.*—To regulate the discipline of said militia, without subjection to the code, and especially, to plan the subordination thereof, and dispose of the force as circumstances shall render most proper.

*Third.*—To levy by assessment in the whole state a forced loan of twenty thousand dollars, the payment whereof shall commence in one year from the evacuation of the republic by the invaders; should it not be possible to close the payments after the expiration of this term, an interest of four per cent. shall be assigned those who furnish the loan, until the total liquidation of the capital.

*Fourth.*—In any urgent case, should it be difficult, in the opinion of the executive, for the permanent deputation to convene, he may proceed of himself, taking such measures as he shall deem necessary for the safety of the state, giving subsequent notice to congress of his operations, and the motives thereof.

*Fifth.*—To include in the twenty thousand dollars loan specified in power third the ecclesiastics residing in the state with the concurrence of their respective bishops, with the exception of the patrimonial or privileged property they enjoy.

*Sixth.*—To fulfil, when circumstances imperatively demand, the laws and orders of the national authorities, which in ordinary circumstances would require the intervention of congress; making suitable provision for the execution thereof.

**ART. 9.** The state rents, and capital specified in articles 1, 2 and 3, shall be liable or subject to the payments specified in power third.

ART. 10. The tax of article 98 of the regulations of the civic militia, shall include those who, past fifty years of age, still appear of themselves.

ART. 11. Those who, on account of being engaged in their own, or the concerns of others, wish to be exempted from the service to which they are destined by power first of article 8, shall exhibit from ten to forty dollars at once, and from four rials to two dollars per month during the war; the exception mentioned in this article shall continue for two years; and both this and the impost shall be at the discretion of the executive.

ART. 12. The executive shall have power to fill vacancies of field officers that occur in the civic militia, selecting from the same battalion, or respective squadron, the most suitable persons, without subjecting himself to the rigid scale of promotion, having power to select from among the exempts mentioned in article 10, which favor shall not include the officers.

ART. 13. This decree shall be observed provisionally so long as the circumstances continue that have given rise thereto, with the exception of articles 2 and 6, which shall still remain in force.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 5th of September, 1829.

JOSE M. BALMASEDA, *President.*

IGNACIO SENDEJAS, *Dep. Sec'y.*

VICENTE VALDES, *Dep. Sec'y.*

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#### DECREE No. 106.

The Congress of the state of Coahuila and Texas, convened in extraordinary sessions, has thought proper to decree as follows:

ART. 1. The twenty thousand dollars forced loan, specified in power third, of Decree No. 105, shall be destined to cover that of twenty-seven thousand assigned to this state by the general congress.

ART. 2. Those who furnish the loan, both in applying for the respective payment, and in exacting the interest that belongs to them, shall conform to the provision of the general law of the 17th of August last.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 10th of September, 1829.

[The same Signers.]



## DECREE No. 107.

The Congress of the state of Coahuila and Texas, convened in extraordinary sessions, and in view of the general law of the 22d of August last, decrees:

Two per cent. duty of consumption shall be imposed on foreign goods in addition to the three per cent. already established.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 10th of September, 1829.

[The same Signers.]

## DECREE No. 108.

The Congress of the state of Coahuila and Texas, convened in extraordinary session, decree:

ART. 1. The congress of the state hereby declares its adoption of the plan of the army of reserve, proclaimed in Xalapa.

ART. 2. During the next sessions congress shall make such observations as occur to the same, relative to the aforementioned plan.

ART. 3. Should any citizen, of whatever class, excite commotion, compromising the public safety under pretence of joy for this event, he shall on sole investigation of the fact, be deemed guilty of a capital crime.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 31st of December, 1829.

[The same Signers.]

## DECREE No. 109.

The Congress of the state of Coahuila and Texas, viewing that the circumstances that gave rise to Decree No. 105 of the 5th of September last, have now disappeared in the republic, has thought proper to decree as follows:

ARTICLES 4, 5, 7, and the 8th in the first, second, fourth and sixth powers thereof of the aforementioned decree, are hereby repealed.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 5th of January, 1830.

JOSE MARIA BALMASEDA, *President.*

IGNACIO SENDIJAS, *Secretary.*

VICENTE VALDES, *Secretary.*

## DECREE No. 110.

The Congress of the state of Coahuila and Texas, pursuant to their *pronunciamiento* in favor of the plan of the army of reserve, proclaimed in Xalapa, and sanctioned in Decree No. 108, agreeably to the second article thereof, has thought proper to decree:

ART. 1. The republic being afflicted with notorious misfortune, in consequence of abuse committed in the different departments of its administration, the general congress is hereby requested to remove all the officers, against whom the public opinion has been clearly manifested.

ART. 2. The general congress is hereby requested, on opening its sessions, to propose to the congress of the state such measures as in its opinion may contribute to remedy the evils mentioned in the preceding article, and promote the public welfare.

ART. 3. The state solemnly promises not to co-operate in measures tending to party revenge, which the public policy and convenience require should be regarded as extinguished and forgotten.

ART. 4. In pursuance thereof, the state declares itself protector of the army of reserve, provided said army punctually fulfil the promises and guarantees set forth in the plan they have published or proclaimed, and with that understanding the executive of the state shall furnish said army with such aid as the funds of the public revenue permit.

ART. 5. The executive shall carry on his usual correspondence with the national executive, resident in the capital of the republic.

ART. 6. The executive shall forward this decree, accompanied by his respective explanatory despatch to the said national executive, to the generals in chief of the army of reserve, governors of the states, generals, commandants, and political chiefs of the territories.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 9th of January, 1830.

[The same Signers.]

## DECREE. No 111.

The Congress of the state of Coahuila and Texas, in view of the ground taken by the second alcalde of this capital, for not discharging his office, viz: that he considers the privilege to be still in force granted to persons newly married by the law, last clause under the first head, book 5th of the Spanish collection of statutes; and considering that should this still continue in force as a concession made by the King of Spain to his old dominions, it would di-

rectly conflict with the form of government adopted by Mexico, decrees:

Law 14th, first head, book 5th of the Castilian collection, in the part wherein it treats of municipal offices and assessments shall be understood as repealed.

For its fulfilment, the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 13th of January, 1830.  
[The same Signers.]

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DECREE No. 112.

The Congress of the state of Coahuila and Texas has thought proper to decree:

Joseph M. Bangs, a native of the United States of the North, is hereby declared a citizen of Coahuila and Texas.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 15th of January, 1830.  
[The same Signers.]

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DECREE No. 113.

The Congress of the state of Coahuila and Texas, in attention to the question proposed through the channel of the executive by the Ayuntamiento of the town of Candela for complying with decree No. 90, has thought proper to decree the following articles in explanation of said decree.

ART. 1. The assessment made in decree No. 90, shall be obligatory only on all Coahuilteixians over eighteen years of age.

ART. 2. Raw rations received by hired servants shall not be computed in the assessment.

ART. 3. The exception made by article 16 only means that sons eighteen years of age, attached to families, and not included in the polls, shall not be taken for vagrants, but the heads of families shall not for that reason omit to compute them in the estimate they make of their income.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 22d of January, 1830.  
[The same Signers.]

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DECREE No. 114.

The Congress of the state of Coahuila and Texas has thought proper to decree:

That the order of the 9th of August, 1827, being repealed, the

towns of San Francisco and San Miguel de Aguago, proceed to establish their ayuntamiento in the town which the executive shall consider most suitable, proceeding with his report to trace out the limits of the new municipality, giving notice thereof to congress for their information and approval.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 26th of January, 1830.  
[The same Signers.]

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DECREE No. 115.

Municipal Ordinances of the town of San Juan de Allende.

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DECREE No. 116.

Municipal Ordinances of the town of San Nicolas de Capellania.

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DECREE No. 117.

Municipal Ordinances of the town of Morelos.

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DECREE No. 118.

The Congress of the state of Coahuila and Texas, in view of the question proposed by the executive on the 4th of September last; whether the substitutes who fill the offices of magistrates and attorney general of the tribunal of justice should necessarily possess the qualifications required by article 200 of the constitution of the state, has thought proper to decree as follows:

ART. 1. Should there be absolutely no counsellors possessing the qualifications required by article 200 of the constitution, persons under twenty-five years of age who are counsellors, shall be eligible as substitutes to fill up the offices of magistrates and attorney general of the tribunal of justice.

ART. 2. If there should be no counsellors at all, said provisional offices may be filled up by citizens over twenty-five years of age, who, in the opinion of the congress or of the executive, as may be the case, shall have the necessary instruction to serve the aforesaid offices, with the previous advice of the council, and in conformity, as to the appointments, to the Decree No. 103.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 16th of February, 1830.

RAFAEL MANCHOLA, *President.*

VICENTE VALDES, *Secretary.*

JOSE M. BALMASEDA, *Secretary.*

**DECREE No. 119.**

The Congress of the state of Coahuila and Texas has thought proper to decree:

**ART. 1.** The resignations of those offices, the appointment of which belongs to the congress of the state, shall be made before the same through the executive.

**ART. 2.** During the recess of congress the executive is authorised to admit such resignations, and to make the provisional appointments, in conformity to the article 3, of Decree No. 103.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given in the city of Leona Vicario, on the 19th of February, 1830.  
[The same Signers.]

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**DECREE No. 120.**

The Congress of the state of Coahuila and Texas has thought proper to decree :

**ART. 1.** In the statement which, by the article 43 of the law No. 17, the executive is to give every month, that of the moneys received and paid by the treasury shall be included.

**ART. 2.** Both statements shall be made according to the annexed one, so that the respective statements which, by the order of the 1st of August last to be circulated, may be inserted in the Gazette.

For its fulfilment the governor of the state shall cause it to be printed, published and circulated.

Given at the city of Leona Vicario, on the 19th of February, 1830.  
[The same Signers.]

## TITLE II.

## LAWS, ORDERS AND CONTRACTS FOR AUSTIN'S COLONY.

*Translation of the Laws, Orders, and Contracts on colonisation, from January, 1821, up to 1829; in virtue of which, Colonel Stephen F. Austin introduced and settled foreign emigrants in Texas: with an Explanatory Introduction.*

## INTRODUCTION.

*To the Settlers in what is called "Austin's Colony," in Texas.*

IN order that the settlers, who have been established in Texas, under the authority granted by the government, to Mr. Stephen Fuller Austin, may fully understand the means by which they obtained admission, and procured titles for land in this country, and the nature of those titles, the following succinct narrative is presented to them, as an introduction to the translations of the several laws, decrees and contracts on colonisation, which follow, in the regular order of their dates. Manuscript translations of these documents, have heretofore been made and published, so far as it was practicable to give publicity to them in that shape, and the originals have always been open to the inspection of any one who called at the office for that purpose. The earliest, and only opportunity which has ever occurred, of publishing them in print, is now embraced.

The idea of forming a settlement of North Americans in the wilderness of Texas, originated with Mr. Moses Austin, of Missouri, and after the conclusion of De Onis's treaty in 1819, efforts were made by him to put matters in train for an application to the Spanish government in Spain. If the application succeeded, it was contemplated to remove a number of families in a body, through Arkansas territory; and as a preparatory step, his son, Stephen Fuller Austin, was sent to Long Prairie, on Red river, with some hands, &c., for the purpose of opening a farm near the boundary line, which it was thought would be useful, to furnish provisions, and afford facilities to emigrants; and a resting place, until some preparation could be made in the wilderness of Texas. It was thought that the farm could be advantageously sold afterwards, or continued as a cotton plantation, should the enterprise totally fail. At that time, there were but three families at Long Prairie, and Hempstead county had just begun to settle. In answer to the inquiries of the elder Austin, as to

the best mode of laying the subject before the Spanish government, he was advised to apply to the Spanish authorities of New Spain. He accordingly undertook the journey, from Missouri to the capital of the province of Texas. The information collected by the younger Austin, on Red river, had convinced him that the route by way of Natchitoches, or by water from New Orleans, was much preferable to the one originally contemplated through Arkansas territory; which, added to the unhealthiness of the situation at Long Prairie, and other circumstances, caused an abandonment of the farming project at that place; and he met his father at Little Rock in the summer of 1820. It was there arranged, that the father should proceed to the capital of Texas, and the son to New Orleans; the former to see what could be done by an application to the Spanish authorities of New Spain; and the latter to make some preparatory arrangements in New Orleans, for facilitating the transportation of families, furnishing supplies, &c., and also, to be ready to proceed to the Havana, in the event of its being necessary to have recourse to the government in Spain.

The elder Austin arrived at Bexar, the capital of Texas, early in December, 1820, and, on presenting himself to the governor, he received a peremptory order to leave that capital instantly, and the province, as soon as he could get out of it. This order was issued in consequence of the general regulations then existing, prohibiting any foreigner from entering the Spanish territory, without a specific description of passport. There was no remedy; and he left the governor's house to prepare for his departure. In crossing the public square, he accidentally met the Baron De Bastrop, with whom he had a slight acquaintance, in the United States many years previous. Mr. Austin became a Spanish subject in Upper Louisiana, in 1799, and De Bastrop went to the governor with the documents which he had brought with him to prove the fact; a second interview was thus obtained with the governor, and after several days deliberation, and consultation with the *cabildo*, a memorial was presented by Mr. Austin, asking for permission to settle three hundred families in Texas; which was sent on to the superior government of the eastern internal provinces, strongly recommended by the local authorities of this province.

He left Bexar in January and arrived in Missouri in the spring, and immediately set about making the necessary preparations for a removal to Texas, as soon as he should hear of the success of his application. His preparations, however, were greatly retarded by ill health, and on his return in the winter through Texas, he suffered greatly from exposure to bad weather, swimming and rafting rivers and creeks, and for want of provisions; for at that time, Texas was an entire wilderness, from Bexar to the Sabine. Nacogdoches and the settlements in its vicinity had been totally broken up, and the inhabitants driven off by the expedition that was sent the year before by the Spanish government against the revolutionists in that quarter.

He reached Natchitoches, on his return, much afflicted by a severe cold that had settled in his breast, and which terminated in an inflammation that finally ended his existence in Missouri, a few days after he had received information of the success of his application. He left a request that his son Stephen should prosecute the enterprise, which he had thus commenced, of forming a settlement in Texas.

Mr. Moses Austin was a native of Durham, in the state of Connecticut, and much distinguished for enterprise and perseverance. At the age of twenty he married Miss Maria Brown, in Philadelphia, and soon after established a commercial house in Richmond, Virginia, in partnership with his brother Stephen, who was at the head of an extensive importing house in Philadelphia. They afterwards purchased the lead mines, called Chissel's mines, on New river, Wythe county, Virginia, to which he removed and established a regular system of mining and smelting shot, sheet lead, and other factories of lead, for which purpose, miners and mechanics, in those branches, were introduced from England; for, at that time, manufactories of this description, were in their infancy in the United States. Revolutions, incident to extended commercial business, and to adventurous enterprise, brought on a reverse in both the Philadelphia and Virginia houses, and Mr. Moses Austin having received flattering accounts of the lead mines of Upper Louisiana, (now Missouri,) he determined to visit that distant and then unknown country. Accordingly, having procured the necessary passports from the Spanish minister, he visited upper Louisiana in 1797, and procured a grant from the governor general, Baron de Carondelet, for one league of land, including the *Mine-a-Burton*, forty miles west of St. Genivieve; and after closing all his affairs in the United States, he removed his family and a number of others from Wythe county, by a new and almost untried route, down the Kanaway river, to his new grant, in 1799, and laid a foundation for the settlement of what is now called Washington county in Missouri. The family of his nephew, Elias Bates, was the first, and his own, the second, that ever spent a winter at Mine-a-Burton, now Potosi. The early settlers of that place and county, will bear ample testimony, as to his enterprise, public spirit, and honorable character; which qualities, in fact, brought on another reverse of fortune, and caused him to turn, with unabated ardor, in the decline of life, to a new and hazardous enterprise, in the wilderness of Texas.—It is hoped the reader will pardon this digression; it was thought due to the real author of that enterprise, which has led to our location in this country.

The memorial of Moses Austin was granted on the 17th of January, 1821, by the supreme government of the eastern internal provinces of New Spain at Monterey. It gave permission to said Austin to introduce three hundred families in Texas. A special commissioner was despatched by the governor of Texas, in conformity with the orders of the commandant general, Don Joaquin de Aredondo, to the United States, for the purpose of communicating to Mr. Austin the



result of his application, and of conducting the said families, in a legal manner, into the country. This commissioner was Don Erasmo Seguin, a very respectable citizen of Bexar.(1)

S. F. Austin, who was in New Orleans, as before stated, having received information of the arrival of the commissioner, Don Erasmo Seguin, at Natchitoches, proceeded to that place, and there heard the death of his father. He then determined to accompany the said commissioner to Bexar, explore the country, and make such further arrangements as might be necessary to prosecute the enterprise. He accordingly started from Natchitoches the 5th July, 1821, with seventeen companions, in company with said commissioner, and some other gentlemen from Bexar, among whom was Don Juan Martin Berri-mendi, also a respectable citizen of that place. The whole company arrived in the capital of Texas, on the 10th of August, by the upper or San Antonio road. He was kindly received by governor Martinez, who granted him a general permission to explore the country on the Colorado river, sound its entrance, harbor, &c., and select such a situation as he might consider the most advantageous for the new settlement.(2)

The governor requested Austin verbally, to furnish a plan for the distribution of land to the new settlers; he accordingly proposed one, which, in his opinion, was sufficiently advantageous to the settlers, and at the same time, adapted to the wilderness state of the country, which required a compact location, to ensure safety from the Indians. The basis established in the plan proposed, was, to give each head of a family and each single man over age, six hundred and forty acres, three hundred and twenty acres in addition for the wife, should there be one, one hundred and sixty acres in addition for each child, and eighty acres in addition for each slave. This plan was presented in writing, and Austin received authority from the governor to promise that quantity to the settlers.(3) He was also commissioned by the governor to take charge of the local government of the new settlement, until it could be otherwise organised.(4)

He departed from Bexar the last of August, and from La Bahia, (now Goliad,) the 10th of September. At the latter place he procured a guide from the alcalde, in virtue of an order to that effect from the governor. His company was now reduced to nine men, the others having returned from La Bahia to the United states. He explored the river Guadalupe, down to the bay, and attempted to follow round the bay shore to the mouth of the Colorado; but finding that the

(1) See the original official document, from governor Antonio Martinez, to Moses Austin, dated Bexar, 8th Feb., 1821, filed in the archives of the colony, and recorded on page 3d of the register and herein translated.

(2) See the original dated in Bexar, 14th August, 1821, filed and recorded on page 4th of the register, and herein translated.

(3) See the governor's original official letter, dated 19th August, 1821, filed and recorded on page 4th of the register, and herein translated.

(4) See official letter, dated 24th August, 1821, on file, and recorded on page 4th of the register, and herein translated.

guide knew nothing of the route, after leaving the Guadalupe, and frequently involved the company in difficulties among the numerous tide inlets; he dismissed him, and bore up north until he struck the road of the crossing of La Baca, and explored the Colorado and Brazos, as far as was practicable, and sufficient to convince him of the fertility of the country on those two rivers; and its eligibility for the new settlement. On his return to Louisiana, he published in the newspapers a notice of the contemplated new settlement, stating the quantity of land which he was authorised by the governor's letter of the 19th of August, to promise; and also stating that each settler must pay twelve and a half cents per acre—he, Austin, taking upon himself all the cost of surveying, and all other costs and fees or charges of whatever kind, as well as the translating, trouble and labor of attending to the business, and procuring the titles, &c. Said sum was to be paid after receipt of title, in instalments. (5) This twelve and a half cents per acre was also designed to provide for the defence of the new settlement against the hostile Indians, to furnish supplies to aid poor emigrants, and to defray the necessary expenses of the local government. He also considered that he was justly entitled to a remuneration for his labor and expenses, and he run the risk of saving something for himself out of said funds: his father had also expended much time and money in the enterprise; besides the fatigue, privations and sufferings of such a journey, as that from Potosi, in Missouri, to Bexar and back again; the most of it through a wilderness. It was evident that a fund was necessary, or the settlement must fail. A moment's reflection showed the utter impracticability of attempting to raise it by voluntary contribution or subscription amongst the settlers, and the plan of a tax on each settler would have been kindling a volcano under the cradle of the enterprise. There was, in fact, no other safe mode but to make it a matter of voluntary contract, formed and entered into, by and between Austin on the one part, and the settlers on the other; and in order to give due notice of said contract, to all concerned, it was published in the newspapers, so that each might know, before he started from his former residence, to emigrate, on what terms he would be received; and the act of applying for admission, as one of the 300 settlers, was an acceptance by the applicant, of the terms offered, and a ratification on his part, of said contract, whether he specially signed a bond to that effect or not. Austin consulted the governor of Texas on this subject; and after explaining its nature and objects, he asked the opinion of the governor, as to whether the government would be likely to interfere with such an arrangement, between him and the settlers. The governor observed, that the government would expect a strict compliance, as to the number and description of settlers, but he could see

(5) See Louisiana Advertiser, and other papers of that state, and Mississippi, between the 1st of October and the last of December, 1821, and also, see the original permits, given by Austin to the first settlers, some of whom probably still retain them.

no reason why it should interfere with any private arrangement, legally and fairly made with them, of the kind indicated. The case was supposed that should 900 families apply for admission, only 300 of them could be received, and he should therefore say to them, those who pay me a certain sum will be admitted. The opinion was expressed that if no fraud, or deceptive allurements were held out, to mislead, even such an arrangement as that, freely and voluntarily made, and understood by all parties, would not be interfered with by the government; he observed, however, that it was merely a matter of opinion with him, as he could not say what the superior government might do in such cases. Under this view of the matter, and for the objects of general utility, before explained, Austin adopted the plan he did, in regard to the twelve and a half cents per acre. This explanation is given, because this subject belongs properly to the history of the land titles; and it is one about which there has been some erroneous impressions. It is very evident that mere-speculation was not the object, as some have stated, for but little would have been left, at best, after paying the expense of surveying, the office fees, the commissioner's fees, the stamp paper, and defraying the other necessary expenses; the object, therefore, must have been the general good of all, and not the private speculation of one individual.

In December, 1821, Austin arrived on the river Brazos, at the La Bahia road with the first emigrants, and the new settlement was commenced in the midst of an entire wilderness. Without entering into a detailed history of the settlement, and noticing all the difficulties, privations and dangers that were surmounted by the first emigrants, it is sufficient to say, that such a detail would present examples of inflexible perseverance and fortitude, on the part of those settlers, which have been seldom equalled, in any country or in any enterprise. (6)

(6) Arrangements were made by Austin in November, 1821, to send out emigrants and supplies of seed corn, provisions, tools, &c. by sea, from New Orleans, much money was spent, and one vessel, the schooner *Lively*, was lost, without any avail or benefit whatever, to the settlement; for, owing to the inaccuracy of the charts, or some other cause, those who commanded the first vessels, did not find the appointed place of rendezvous, the mouth of the Colorado. One cargo which reached that place was destroyed by the Karankaways, in the fall of 1822, soon after it was landed, and four men were massacred. These disappointments compelled the emigrants to pack seed corn from Sabine or Bexar, and it was very scarce at the latter place. They were totally destitute of bread and salt; coffee, sugar, &c. were remembered and hoped for, at some future day. There was no other dependence for subsistence, but the wild game, such as buffalo, bear, deer, turkeys, and wild horses (*mustangs*). The Indians rendered it quite dangerous, ranging the country, to hunt buffalo; bears were very poor and scarce, owing to a failure in the mast, and poor venison, it is well known, is the poorest and least nutritious of all the meat kind. *Mustang horses*, however, were fat, and very abundant, and it is estimated that 100 of them were eaten, the first two years. The Karankaway Indians, were very hostile on the coast; the Wacos and Tanwakanies were equally so in the interior, and committed constant depredations. Parties of Takaways, Lepans, Beedias, &c. were intermingled with the settlers; they were beggarly and insolent, and only restrained the first two years, by presents, forbearance and policy; there was not force sufficient to awe them. One imprudent step with these Indians, would have destroyed the settlement; and the settlers deserve as much credit for their forbearance, during the years '22 and '23, as for their fortitude. In '24,

In March, Austin proceeded to Bexar, to make his report to the governor, where he was informed for the first time, that it would be necessary for him to proceed immediately to the city of Mexico, in order to procure from the Mexican congress, then in session, a confirmation of the permission to Moses Austin, and receive special instructions, as to the distribution of land, the issuing of titles, &c.

It should have been stated before, that Austin received the first positive information of the revolution, and plan of Iguala, of the 24th February, 1821; and of the complete independence of Mexico, on his arrival at Bexar, in August of that year; so that the official acts of governor Martinez, relative to the new settlement, dated in August, 1821, were from a governor of the independent Mexican nation, and not from a Spanish governor. For this reason, the intimation as to the trip to Mexico, was totally unexpected, and very embarrassing; for not calculating on any thing of the kind, he had not made the necessary preparations for such a journey. There was no time for hesitation; arrangements were made for Mr. Josiah H. Bell to take charge of the new settlement, and Austin departed for Mexico, a journey of 1200 miles by land.

The Mexican nation had just sprung into existence. The galling chains of Spanish despotism had been gloriously thrown off, but the necessary restraint of law, system, and local police, had not yet been sufficiently established; much disorder prevailed in consequence, in many parts of the country; and the roads were infested in many places, with deserters, and the lawless bands of robbers. Austin, however, arrived in the great capital of this nation, on the 29th of April, 1822, without any other accident than being overhauled, and partially robbed by a war party of 54 Camanches, on the river Nueces, about one hundred miles beyond Bexar. From Monterrey he had one companion, Lorenzo Christie, who had been a captain, in general Mina's expedition. They both disguised themselves, in ragged clothes, with blankets, &c., in the same style, as to pass for very poor men, who were going to Mexico, to petition for compensation for services, in the revolution. Their passports explained to the several authorities, as they passed, who they were, and many friendly cautions were given as to the robbers.

The national congress had been in session since the 24th of February of that year. The form of government, as then established, was a limited monarchy, in conformity with the plan of Iguala, and treaty of Cordova, and the Spanish constitution was provisionally adopted. The executive department was administered by a regency, of which, the generalissimo, Don Augustin Iturbide, was president. The state

the force of the settlement justified a change of policy, and a party of Tankaways were tied and whipped, in presence of their chiefs, for horse stealing. Long details cannot now be given, and this note is inserted merely to give a general idea, of what must have been the difficulties, privations and dangers, which had to be borne and overcome, during the first years of the settlement.

of political affairs in the capital, at this time, was very unsettled. Generals Victoria and Bravo, and several other republican leaders of rank, who had been imprisoned by Iturbide in November, for opposing his ambitious designs, had escaped from confinement, not long before; serious dissensions had already arisen between the generalissimo and congress; the regency were divided, and in discord among themselves; Yanez, one of its principal and most liberal members, having had a personal dispute of great warmth with Iturbide, during one of the sittings, in which the terms "traitor," "usurper," &c., were mutually passed; the friends of liberty were greatly alarmed at the ascendancy which the generalissimo had acquired over the military, and lower class of the populace; and every thing indicated an approaching crisis. Accordingly on the night of the 18th of May, the soldiery and populace, headed by sergeants and corporals, proclaimed Iturbide emperor. It was a night of violence, confusion and uproar. The 700 bells of the city, pealing from the steeples of monasteries, convents and churches; the firing of cannon and musketry from the different barracks; and the shouts of the populace in the streets, proclaimed to the true friends of freedom, that a few common soldiers, in union with a city mob, had taken it upon themselves to decide the destiny of Mexico, and to utter the voice of the nation. The session of congress on the 19th was held, surrounded with bayonets, and the man who was thus proclaimed by a rabble, amidst darkness and tumult, was declared by a decree of the majority of that body, to be emperor of Mexico.

In such a state of political affairs, all that a person could do, who had business to transact with government, was to form acquaintances, try to secure friends, and wait for a favorable opportunity. Austin adopted this course, and devoted the principal part of his time to studying the Spanish language; for when he arrived at Mexico, he labored under the disadvantages of being a foreigner, a total stranger, and ignorant of the language of the country, except what little he had acquired in his first trip to Bexar, and on his journey to the capital.

On examination into the state of this colonisation business, he found that the regency had decided, that the governor of Texas, Martinez, was not sufficiently authorised to stipulate what quantity of land the new settlers were to get, as he did, by his letter to Austin, of 19th August, 1821, and that this point must be settled by a law of congress: for which purpose all the documents relative to said new settlement, were transmitted by the regency to congress. This at once explained the reason, why governor Martinez urged Austin to go to Mexico, for he was doubtless well aware, that in the then existing state of political affairs, nothing would be done in the business unless some one was present to attend to it.

Austin endeavored to procure the despatch of his business by means of a special law, but found it to be impracticable, owing to several petitions having been presented for colonies, which gave rise to an idea among the members, that a general colonisation law ought to be

passed, and that all should be placed on the same footing; (7) nothing, therefore, could be done, until such a general law was enacted. A standing committee on colonisation had been appointed, previous to his arrival in the city, to which his business was referred. This committee made some progress towards settling the basis of a law; but the coronation on the 21st July, the dissensions between the emperor and congress, the general alarm amongst the liberal members, at the strides of the former towards absolute power; the events which grew out of the violent proceedings of the 26th August, when fourteen of the principal members of congress were seized in their beds and imprisoned; added to the necessary attention to the revenue, and financial departments, and to national affairs generally, precluded any advancement in a matter which was considered to be so comparatively unimportant, as a new settlement amongst barbarous savages, 1200 miles distant, in the wilderness of Texas. Notwithstanding the many embarrassments, however, which retarded the business, the committee on colonisation reported a general colonisation law; the discussion of which had proceeded, in detail, to within three articles of the end, when, on the 31st of October, the congress was turned out of doors by an armed force, acting under a decree of the emperor, which declared that congress was dissolved, and vesting the legislative power of the nation in a *Junta Instituyente*, whose members were all nominated by himself. This event, of course, threw back the colonisation law to its first stage; all had to be begun *de novo*; a new colonisation committee was appointed, a new law was reported, though not differing much from the former, which finally passed, and was approved by the emperor, and promulgated on the 4th of January, 1823.

Thus, eight months after his arrival in the capital, Austin had the satisfaction of finding himself advanced *one step*; a colonisation law was enacted and promulgated. The next step was to procure the despatch of his business from the executive, a task which at first promised to be almost as difficult to accomplish as the other had been, owing to the excitement which was daily becoming more open and manifest, against the arbitrary proceedings of the emperor, which portended another revolution, and of course, a further suspension of all business of an individual nature. Fortunately, however, the minister of exterior and interior relations, Don Jose Manuel Herrera, and the sub-minister of the same department, Don Andres Quintana, were both men of liberal and enlightened principles, and, so far as the then existing state of politics would permit, they were favorable to the emigration of foreigners. The despatch of individual affairs appertaining to the interior, or home department, was principally confided to the sub-minister, Quintana. The captain general of the internal provinces, Don Anastacio Bustamante, (now vice president of the na-

(7) Among the petitions on colonisation that were presented at this time, was one by Gen. James Wilkinson, and another from the Nashville company, Ten. This latter petition was not finally despatched, until 1825, under the state government of Coahuila and Texas; all the others failed.

tion,) within whose command Texas was included, also took a very liberal and enlightened view of the advantages which would result to the nation, from settling the wilderness of Texas, to which he was very favorably inclined: also, a number of the members of the *Junta Instituyente*, and of the council of state, were favorably disposed towards the enterprise; added to all which, the claims of Austin, on the attention and justice of government, were strong and incontrovertible. He came into Texas with the emigrant settlers, in virtue of a permission, legally granted to his father, by the competent Spanish authorities, previous to the change of government; he was also officially conducted into the country, by a commissioner, expressly appointed by the governor of Texas, for that purpose; and on his arrival at the capital of that province, he was officially received, and recognised by governor Antonia Martinez, after the change of government; and officially authorised by that functionary of the independent Mexican nation, to proceed with the settlement; the amount of land to be distributed to each settler was stipulated; and he, (Austin,) was appointed to administer, provisionally, the local government of the new settlement. He had also been detained nearly a year in Mexico, on this business. These circumstances enabled him to bring the matter before the council of state, in a shape which procured its speedy and favorable despatch, by that body, who reported their opinion relative to it, on the 14th of January; and on the 18th of February, 1823, the minister Andres Quintana, issued the emperor's final decree on the subject. This decree was conformable, in general, to the advice given to the emperor, by the council, in their report, though not exactly, in every particular. (8)

The great object which took Austin to Mexico being accomplished, he made preparation to depart immediately for Texas, and intended to have started on the 23d of February, but, previous to that day information reached the city, relative to the progress of the revolution against the emperor which convinced all reflecting men, that a great political change of some kind was near at hand.

On the 2d December, Gen. Santa Anna, who commanded at Vera Cruz, raised the standard of opposition to the arbitrary proceedings of Iturbide, and on the 6th, in union with the civil authorities of that city, he published a "*plan*," the basis of which was the re-union of the same congress, whose members had been dispersed by the arbitrary order of the emperor, on the 31st October; and that its deliberations should be free from military restraint. General Victoria suddenly appeared from the retreat where he had remained concealed, since his flight from Mexico, in February, 1822, and joined the congress party. A severe, though not decisive battle, was fought at Xalapa, on the 21st of December, between Santa Anna and the imperial troops, in which the former failed to get possession of that town. General

(8) See the report of the imperial council, and the decree of the emperor, on file in the archives, and recorded on pages 7, 8, 9, of the register; the decree only is translated.

Guerrero and Bravo also retired suddenly from the capital, and took the field in favor of congress, at the head of the guerillas, in Oaxaca, and towards Acapulco; and on the 2d of February, the army that was besieging Santa Anna in Vera Cruz, under the command of Gen. Echavarri, revolted in a body from the emperor, and forming a junction with the besieged, declared in favor of congress, and published another plan, similar to that of Santa Anna's, called the *Plan of Casa Mata*. These events gave great impulse to the revolution, which spread through the provinces of Vera Cruz, Puebla, Oaxaca, and parts of Mexico. Vivanco, the captain general of Puebla, declared in favor of congress; and owing to his popularity with the soldiers, was appointed commander-in-chief of the "liberating army." All the other parts of the nation, however, had thus far appeared to remain quiet, and in favor of the emperor: though a general anxiety, suspense and excitement, had prevailed since Santa Anna's defection; which was daily becoming more intense, and tending towards a decisive crisis. On the 19th February, the minister, Jose Manuel Herrera, secretly fled from the capital, and concealed himself so effectually, that he was supposed to be dead for two years afterwards. And on the 20th and 21st, information was circulated in the city, of the general defection from the emperor, of those parts of the nation, which had heretofore remained passive; and Iturbide began to be publicly spoken of as a usurper; and some were of opinion that all his acts would be annulled by congress. This would have thrown Austin back to where he started the year before; and it was therefore too important a matter to be left unattended to. He consulted several lawyers and other persons of information on the subject: some gave the opinion that all acts of the government *de facto*, of such an individual nature as this, where the rights and interests of individuals alone were concerned, without being in any way connected with the general politics of the government or nation, would be good; and others thought that it would be safer to obtain the sanction of congress. It was sufficient for Austin, that any doubt appeared to exist; and he determined to suspend his journey to Texas, and wait the meeting of congress, which it was now evident, must soon take place.

Early in February, the emperor marched out of the city in person, at the head of all the troops he could collect, and occupied a station at the village of Istapaluca, five leagues on the road to Puebla. Finding, however, that he could not rely upon his troops, and that the opposing force, which was approaching on the Puebla road, under Vivanco, greatly exceeded his, and was daily augmenting by desertions from his own army; he consented to a cessation of hostilities, and commissioners were appointed on both sides, to treat. The said commissioners met in the village of Mexicansingo, a few leagues out of the capital, and agreed in substance: that the emperor should retire to Tacubaya, three leagues from the city; that congress should convene, as soon as its dispersed members could be collected; and that all parties should unconditionally submit to



whatever congress might dictate; neither to have any troops in the city, and the necessary guards to keep order, were to be placed under the direction of the local civil authority, until congress met. Both parties complied with this treaty. Congress convened, and on the 29th of March decided: 1st. That the sovereign constituent congress of the Mexican nation was in legal session, there being one hundred and three members present, which was a majority of the whole number, and that its deliberations were entirely free from all military, or other forcible restraint. 2d. That the executive power of Mexico, which had existed since the 19th of May, 1822, up to that time, had ceased. 3d. That this decree should be communicated to the supreme executive power, which would be established by congress, for its publication, &c. On the 31st, congress decreed that the executive authority of the Mexican nation should be provisionally deposited in a body, who should be styled, the *Supreme Executive Power*, and be composed of three individuals, &c. On the same day, the three persons who were to compose the executive, were elected by congress, viz.: Nicholas Bravo, Guadalupe Victoria, and Pedro Celestino Negrettee; and Jose Mariano Michelena, and Miguel Dominguez were elected supernumeraries, to fill the places of any of the others who might be absent, until their arrival. (9) An entirely new organisation of the different branches of the government now took place. On the 8th of April, congress decreed that the coronation of Don Augustin de Iturbide, was an act of violence and force, and was null; and consequently, that the resignation of the crown tendered by him, on the 19th of March, could not be considered by congress, and that the hereditary succession, and all titles emanating from said coronation, were null; and all the acts of the last government, from the 19th May, 1822, to the 29th May, 1823, were illegal, and subject to be revised, confirmed, or revoked by the government now established; and finally, said decree banished Iturbide from the Mexican territory forever; but assigned him \$25,000 annually, (provided he resided in some part of Italy,) and fixed a pension of \$8,000 annually on his family after his death. (10.)

In consequence of the decree of 8th April, Austin presented a

(9) See the above decree, on pages 93 and 94, vol. 1st of the "*Collecion de los decretos y ordenes del Soberano Congreso constituyente Mexicana*," printed by order of congress, at the government press, city of Mexico, 1825.

(10) See said decree, page 108, vol. 1st of the "*Collecion*," before cited. The emperor issued a proclamation, convening the same congress he had dispersed, and a part of the members met on the 7th of March, though not a quorum; they therefore did no business, and adjourned from day to day, until the 29th, when a quorum met; on the 19th, Iturbide sent to congress his abdication of the throne; on the 30th, he left Tacubaya for Tulansingo, under a strong guard, commanded by General Bravo, who escorted him from there to Antigua, near Vera Cruz, where he was embarked on the 11th May, on board an English vessel, for Italy. From Italy he proceeded to London, and made preparations for returning to Mexico; in consequence of which, on the 28th of April, 1824, congress passed a decree of outlawry against him. He landed at Soto Marina, 14th July, 1824, in disguise, and was arrested, and shot, at Padilla, on the 19th of that month, at 6 o'clock, P.M.

memorial to congress, together with the concession which he had obtained from the last government on the 18th February; and petitioned congress to confirm said concession, or dispose of it as that body might deem proper. On the 11th April, congress passed a decree, referring said memorial and concession to the supreme executive power, to be confirmed by that power, should it have no objections to said confirmation; said decree also suspended, for the future, the law of colonisation, passed by the *Junta Instituyente*, the 4th of January, 1823, until a new resolution of congress on the subject. (11) On the 14th of April, the supreme executive power issued a decree, in virtue of the act of congress abovementioned, by which that power confirmed in full, the accession granted to Austin by the imperial government, on the 18th of February, 1823; and said decree was circulated by the minister of interior and exterior relations, Don Garcia Illueca, to the captain-general of the internal provinces; and a certified copy of it was delivered to Austin. (12)

Thus, after one year's detention and exertion in Mexico, Austin, at last, had the satisfaction of leaving there, with his business despatched and confirmed by all the governments which had ruled the Mexican nation, during the said year; and as the last confirmation was by the sovereign constituent congress, whose members were the acknowledged and legal representatives of the people of the nation, there could no shadow of doubt remain, as to the legality and validity of his concession; and on the 28th day of April, he departed from the capital.

On his arrival at Monterrey, the capital of the eastern internal provinces, he presented a consultation to the commandant-general, Don Felipe de la Garza, requesting special instructions, and copies of the laws, for the administration of the local government of the new colony, which was committed to his charge, in general terms, by the decree of the supreme government of 18th February, 1823. This consultation was transmitted by the commandant-general, to the provincial deputation of Nueva Leon, Coahuila and Texas, then in session, in that city; who decreed in substance, that Austin's authority, under the said decree of 18th of February, was full and ample, as to the administration of justice, and of the civil local government of the colony; and the command of the militia; and that his grade or rank as a militia officer should be lieutenant colonel; that he could make war on the Indian tribes, who were hostile and molested the settlement; that he could introduce, by the harbor of Galveston, such supplies of provisions, &c. as might be necessary for the settlement in its infancy; in short, that he should preserve good order, and govern the colony in all civil, judicial, and military matters, according to the best of his abilities, and as justice

(11) See said decree, page 110, vol. 1st, of the "Collecion," before cited, and recorded on page 10 of the Register. (Translated.)

(12) See said decree on file, and recorded on page 10 of the Register. (Translated.)

might require, until the government was otherwise organised, and copies of laws were furnished, rendering to the governor of Texas an account of his acts, or of any important event that might occur, and being himself subject to him and the commandant-general. The local government was thus committed to him with the most extensive powers, but without any copies of laws, or specific instructions whatever, for his guide; the act of the deputation, therefore, left the matter in substance, precisely where the decree of 18th of February had placed it. (13)

On the 17th of July, the governor of Texas, Don Luciano Garcia, appointed the Baron de Bastrop, commissioner on the part of the government, to survey the lands for the settlers of the new colony, and in union with Austin, to issue titles to each one, in the name of the government, conformably to the decree of 18th February, 1823. (14) The said governor, by an official act dated the 26th July, also gave the name of "San Felipe de Austin," to the town, which was to be laid off for the capital of the new colony. (15)

In August Austin arrived in the colony in company with the commissioner Baron de Bastrop. (16) The settlement was nearly broken up in consequence of his long detention in Mexico, and emigration had totally ceased. Many of the first emigrants had returned, and a number of those who started from the United States for this settlement, had stopped on the Ayesh Bayou, and round Nacogdoches, or on the Trinity; and by this means the settlement of those sections of country was commenced. Such arrangements were made by the commissioner, Bastrop, as were necessary, and he then returned to Bexar to fill his station as a member of the deputation of Texas.

In 1824 the commissioner, Bastrop, again returned to the colony, and, in union with Austin, issued the titles to the settlers, for the lands which had been surveyed up to that time; (17) but, as the

(13) See said consultation and proceedings thereon, on file, and recorded on pages 10, 11, 12 of the Register; not translated, because its substance is stated above.

(14) See said commission on file, and recorded on page 13 of the Register—translated.

(15) See official letter on the subject, on file, and recorded on page 14 of the register.

(16) See official letter of the commissioner Bastrop, to James Cummins alcalde of Colorado, dated at Castleman's, on that river, August 5th, 1823, relative to the new colony, and to Austin's authority. After which said commissioner and Austin proceeded to the house of J. H. Bell, alcalde of the Brazos, and gave the same information to the inhabitants there, by which acts they both entered into their respective offices and duties. Page 15, Register—translated.

(17) See official letter of Jose Antonio Saucedo, political chief of Texas, dated 23d June, 1824, recorded page 15, register, to Austin, transcribing his letter to the alcaldes, informing them that the commissioner, Bastrop, had come on to issue titles to the settlers, "so soon as they should pay the fees established by the fee bill, which he circulated while here," which was on the 20th of May of that year; by which fee bill the whole expenses on a league of land were fixed at \$165. It was owing to Austin that this order was not rigidly enforced; and that the titles were issued without paying any thing down, except by those who it was known had it to spare; and that notes were taken for said fees, at long annual payments, and that many who are poor have not been sued on their notes even to this day. Also see his official letters, dated 22d of June, on the same subject and relative to stamp paper—same page—translated.

said Bastrop had been elected a member of the legislature of the state of Coahuila and Texas, just established, he could not remain long enough to complete the surveys and titles for the whole of said 300 families, all of whom had by this time emigrated, and were in the country. He therefore departed for Saltillo, in September, and left a part of the titles unfinished, which, together with the other unfinished business of the colony, was completed by the commissioner Gasper Floris, who was specially commissioned for that purpose by the lieutenant governor of the state of Coahuila and Texas, Don Victor Blanco, then exercising the duties of governor. (18)

By referring to the 23d article of the law of 4th January, 1823, it will be seen that the lands granted under that law, in virtue of the concession of the 18th February of the same year, are subject to the condition of being cultivated by the grantee, within two years from the date of the title, and the same condition is also inserted in each of the titles; which condition being complied with, the title is unconditional, clear, absolute and inviolable, as will be seen by examining said law, and particularly the 22d article.

As regards the limits of the old colony, it will be seen by reference to the concession of the emperor, of 18th February, 1823, that specific limits were not considered necessary, because the colony would be composed of the lands occupied by said 300 families. The rambling disposition of the emigrants dispersed them from the east bank of Labaca to the east side of San Jacinto, and from the sea shore to the upper, or San Antonio road, and land was granted to them in those limits. All the vacant lands that remained after supplying the settlers and the empresario with their portions, was, of course, the public land of the nation. This dispersed settlement of the emigrants, rendered the task of locating, protecting and governing them, much more difficult and expensive than it otherwise would have been; and it was only tolerated on the ground, that if the settlers could sustain themselves from Indian attacks, (and they thought they could,) a scattered settlement, within reasonable bounds, would ultimately be of more advantage to the nation than if the emigrants had all been huddled together; for it disseminated facilities for an establishment of new emigrants, hereafter, over an extensive tract of country. The good policy of this scattering system is now daily proved: corn, pork, &c., can now be had in every direction, without the trouble of distant transportation. It is, however, also attended with inconveniences which hardy enterprise alone would submit to.

The foregoing narrative, with an examination of the documents referred to, will, it is believed, be sufficient to explain to the settlers of the first colony how, and under what authority, they originally came into this country; the delays growing out of the revolutionary state of political affairs, and other circumstances, that were beyond

(18) See the commission of Gasper Floris, dated 7th of February, 1827, recorded page 16, Register—translated.

the control of Austin, which embarrassed the progress of the settlement in its first stages; the exertions made by him to remove those embarrassments, and procure titles for the settlers; and finally, the nature and validity of these titles.

As regards the local government of the colony, it will be sufficient to state, that Austin finding on his return from Mexico, that it would be impossible for him to attend to the land business of the settlers, and the civil affairs of the local government, and also to attend in person, to the administration of justice, through all its perplexing details, in every small case that might occur; continued the two alcalde's districts, into which the settlement had been previously divided, by order of the governor of Texas, Jose Felis Trespalacios, and likewise formed some additional ones, directing that an alcalde or justice should be elected by the people in each; he gave these alcaldes jurisdiction to 200 dollars, with an appeal to him, as the judge of the colony, on all sums over 25 dollars. He also formed a code of provisional regulations, in civil and criminal matters, which was approved by the governor of Texas.

In the month of September, 1824, Mr. Samuel M. Williams was appointed by Austin, secretary of the local government of the colony, which appointment was approved by the governor of Texas, and since that time, he has discharged the duties of that office with a degree of fidelity and industry, which justly entitles him to the approbation and confidence of the inhabitants of this settlement. Austin not having the means of paying him a compensation equal to his services, he has labored without an adequate salary; and the perquisites which he has received in five years would not have supported him one. The land and other records of this colony, present abundant evidence of his neatness and accuracy; and the register, or record book, in which the land documents, and title deeds, are recorded, will forever afford proof of the labor, care and precaution, that have been devoted for the perpetuation of those important documents. It will be remembered that this labor, the formation of the register, was gratuitous on the part of Austin, and the secretary Williams. Neither of them have ever received one cent of compensation for it. The former considered it necessary for the future security of the settlers, that the records should be placed in such a shape, as would render them less liable to be lost or defaced, than they would be, in their original state; for, agreeably to the mode of issuing the titles, each one was on a separate and loose sheet of stamp paper, the original being retained in the office as the record, and a certified copy issued to the interested person. It is evident, that records kept in that way would be liable in time, to wear out, and be totally destroyed, even if they were not misplaced, and lest any difficulties should arise from this, Austin petitioned the government of the state, that an order might be issued from the competent authority, for the transfer of all the records of the colony, that were on loose sheets of paper, into a large bound register or record book. The said order was accordingly

issued, prescribing, particularly, the mode of making such transfer, and declaring that documents thus transferred, should have the same validity in law, as the originals. The mode of transfer was, that each document should be copied into said register, and then compared, word for word, with the original, by the commissioner Gasper Floris, the empresario Austin, and the alcalde of the jurisdiction; all of whom should certify that each document was truly copied from the original, and then sign their names, with two witnesses. (19) This was an immense labor; for, independent of the documents and title deeds, it also included the plot of each tract, at the end of the title. Austin paid the surveyor, Seth Ingram at the rate of five dollars per day, for this part of the work.

It will be seen by an examination of the authority that was vested in Austin relative to the local government of the colony, that it was extensive, and without clearly defined limits, except submission to the governor of Texas, and the commandant general; and that consequently the degree of moral, as well as personal responsibility, which rested upon him individually, was co-extensively great. Had he been furnished with laws and fixed rules for a guide, his responsibility would have depended on his observance of, or departure from those laws or fixed rules; but placed as he was, a peculiar or prejudiced view of his acts, by his superiors, might have involved him in total ruin or unmerited disgrace. It will also be seen that no salary or allowance whatever was assigned him, to defray the expenses of the local government, all of which consequently had to be borne by himself, and which in this jurisdiction were many, owing to its peculiar situation with respect to the Indians, and also for the want of regular soldiers, for expresses, guards, &c., as well as many other expenses, besides those of the office, and the secretary's salary. It will also be remembered that Austin contracted with the government to introduce a certain number of families, for which he was to receive as a premium, a certain quantity of land; but he was not bound in any manner by that contract, to take upon himself the labor, responsibility and expense of the local government; and had he refused to have done it, and some other person had been appointed for that purpose, it would not in any way have interfered with his right to premium land. So that it was, in fact, altogether gratuitous on his part, so far as depended on his contract with the government, to undertake that labor, or not, as he pleased. Why then did he accept of so heavy and expensive a charge?—He accepted it because it was necessary for the advancement of the colony that some one should do so; and no one would have accepted it without a compensation; he considered that he was bound by the original contracts, which he thought were fairly and publicly made, between him and the settlers, previous to the commencement of the colony, as heretofore stated, to be at all the labor and expense of procuring the titles, and advancing the settle-

(19) See said order on file; recorded page 2d register, translated.

ment, so far as it lay in his power, by his individual exertions; calculating that the settlers would never wish to evade the payment stipulated on their parts, when they saw that he had complied, and more than complied on his; for he promised them lands by *hundreds* of acres, and they have received it by *thousands*; league tracts were granted to them by the government, in place of the sections promised by Austin. His expectations, however, were all disappointed; the original contracts passed away, and the colony was dragged forward, amidst pecuniary embarrassments and poverty, with the fatal weight of internal opposition superadded to its other difficulties.

Some misunderstanding has heretofore existed in regard to the payments on land in this colony. For instance, it has been stated by those who knew nothing of the law, or of the subject, that Austin sold the land to the settlers; that he exacted from them what he had no right by law to exact; that he was speculating on the settlers, &c. &c. Never has he asked one settler to pay him one cent in virtue of the colonisation, or any other law, except the law of mutual good faith, between man and man, in their private and individual dealings. He entered into a fair and equitable contract with them, in a public and open manner, in 1821, binding himself to do certain things for their benefit; to wit—to receive them in the number of the three hundred families, which he was authorised to introduce, and settle in Texas; a privilege which, at that time, was not, and never before had been granted, to any foreigners, except individual cases, under peculiar circumstances, and obtained by the most powerful patronage; and one which was not, and could not be legally granted to any others, except to said three hundred families, until after the passing of the national colonisation law of 18th August, 1824, and the state law of 25th March, 1825; up to that time, there was no colonisation law, and no authority whatever in any other person to admit emigrants; for the same act of congress of the 11th April, 1823, which confirmed this privilege to Austin, closed the door as to all others, by suspending the law of 4th January, 1823. True it is, that emigrants did come in previous to the passing of the law of 18th August, 1824, or that of the state law of 1825, who stopped on the Ayesh Bayou, round Nacogdoches, and on Trinity; but they have not yet obtained titles, and were liable to be driven off by the government. Those who will take the trouble to inquire, may see that Austin, at an early day, informed the government, that many of those settlers came into the country in consequence of his publications in the United States, relative to the three hundred families, and had stopped where they were, owing to his long detention in Mexico, and the consequent discouraging reports about his settlement; and that, therefore, they were innocent of any intention to intrude, illegally into the country. He agreed to procure for said three hundred families, titles for a certain quantity of land, and deliver them to settlers at his own cost, he being at all the expense and labor of petitioning, translating, surveying, managing their affairs with government, and all other expenses

of a necessary and public nature, for the advancement of the colony: for all which, they, on their parts, stipulated in the manner before stated, to pay him twelve and a half cents per acre, to be paid in instalments, in produce of the country, after receipt of title. His great object and ambition were, and always have been, to succeed with the enterprise, which he believed he could not do, without the aid of funds. He also believed that the above contracts opened the only safe means of raising them; and they also presented to him a distant prospect of refunding to him the money he had to spend in the outset, before he could call on the settlers for any payments; for he had no right to make such call until after the titles were delivered; and consequently, all the risk of money, labor, and character, was run by him alone, until he completed the business. Because, had he failed in the enterprise, he would have lost all—the character of a visionary or wild speculator would have been given to him by many, and some would have considered that a failure was a crime, or evidence of a want of industry or capacity; which to a certain degree, must have injured his prospects in any other business; and to this heavy account, was to be superadded, the time, expenses, and sufferings of his father. Under the faith of those contracts, therefore, he abandoned all prospects in the United States, some of which were flattering; undertook the enterprise, and devoted himself to a life of toil and privations in a wilderness. He also made engagements in 1821, which, added to other pecuniary embarrassments, growing out of this colonisation business, has kept him too poor even to afford the means of living with that decency which would be expected from the head of such an enterprise as this; and which, in fact, the respectability of the settlement itself, would seem to require; and if what land he has acquired, (and he has but little else,) was valued at its present rates, he is now nearly insolvent. Other men, who have never had any other trouble than to attend to their private affairs, and to receive their titles, have derived more benefit from his labors than he has. As regards his selling land to settlers: the idea of an empresario, under the colonisation law, selling the land of this nation, is so absurd, that it would be an insult to the understanding of those who can read that law, even to refute it. There never have been any payments made to him under the original contracts, although many offered it; but those contracts were interfered with in a manner which rendered it doubtful whether they could have been generally enforced, without jeopardising the principal motive which had stimulated him to persevere in the enterprise, which was to settle the country, and not merely to make a speculation. Had the latter been his object, he certainly would have made a totally different use of the extensive powers that were placed in his hands, than spending his life in a wilderness, harassed by constant cares and perplexities. He, therefore, would not accept of a compliance of the original contracts, from any one, unless it was also exacted from all; thus, those contracts passed away forever; and the payments on the land titles were regulated by



the political chief or governor of Texas, by a fee bill which he published the 20th of May, 1824: those payments were for the commissioner's fees, office fees, stamp paper, surveying fees, &c. A considerable number of the settlers have never to this day paid those fees, that part of them who are too poor have never been called on. The portion of their fees that had to be promptly paid before they could have gotten a title, has been raised for them by Austin, out of other means. He has himself been their translator, their agent, and done all their business for them, even in some cases, to the selecting and locating their lands, and has delivered their deeds to them; for all which, he has received from some of them, murmurings and abuse. It can, however, be truly said, to the honor of the North American character, that the murmuring part of the settlers is limited to a very small number, and it is to be hoped that what has appeared to be ingratitude, even in them, has arisen solely, from not understanding the subject, rather than from disposition.

It is just to correct another erroneous idea, that at one time prevailed, which was, that the fees were paid in money. Money was required from those who it was known had it to spare, which was used to make up the cash payments to the government for the stamp paper, commissioner's fees, &c.; and thus money was raised for the cash payments which had to be made on the deeds of all those who could not raise it themselves; and by that means, and that alone, the poor were provided for as well as the rich; no one was turned away, or even waited for his title, because he was poor; and many have received leagues of land in this colony, who were not worth twenty dollars when they reached here. This system, however, caused murmurs against Austin, on the ground that a distinction was made, and partiality shown. They did not reflect that it was the interest of all to get the settlement under way, and that if poor men had been turned off, because they could not pay the fees, the settlement would have been thinned so much, that it would have been totally broken up. A clamor was raised, and, strange as it may now appear, some of the poorer class, who were most benefitted by that system, joined in it. The mass of the settlers who have paid any thing, paid it in cows, at twenty to twenty-five dollars a head, corn at two or three dollars a bushel, &c. &c.; which property, thus received, has been sold for two-thirds less than it was received at to raise cash, it being necessary to resort to all manner of shifts, to raise the means of keeping up the local government, and managing along the settlers, so as to prevent them from running headlong into anarchy and confusion. It will be remembered that Austin was not supported by the strong arm of government; there never was one soldier stationed in the colony; and for the first four years there were not fifty in all Texas, nor within five hundred miles of it; that he had not the aid of general laws, printed and published in the language of the settlers, by which to restrain them, or guide himself; and that he was not even left to the uncontrolled dictates of his own judgment; for, in that particular,

he was absolutely subject to the commandant general, and governor of Texas, or to the land commissioner, who was united with him, all of whom, except the last, had seen but little of North Americans, except under unfavorable circumstances, and knew but little of their real character or habits: he had, therefore, to resort to such resources as circumstances would permit. In the absence of specific laws, there are two modes of governing—one by force, the other by reason and mild measures. The latter course, perhaps, was most congenial with his disposition, even if the other had been in his power; he adopted it, and has been censured by some for following it to the extent he did. His task was rather difficult; he was isolated, destitute of funds, and inexperienced; no disinterested advisers could approach him, for it was the interest of each one to get all he could for himself; and he may have committed many errors; he has, however, the consolation of having succeeded in the enterprise, a thing which no other, who has attempted it, has done; he has uniformly received the approbation of government; and within the last two years has also received manifestations of confidence from the settlers, themselves, in general; which to him is the most gratifying testimonial that could possibly be offered; for they ought to be the best judges of his acts, having witnessed them all, and been immediately interested.

The foregoing remarks relative to the payments on land, and to the local government of the colony, are made, in order to correct some erroneous impressions that at one time prevailed on the subject. It is no more than justice that the matter should be placed in its true light; and it is equally just, that the conduct and motives of the settlers should be noticed, lest, from what has been said, some should be inclined to censure them; for any such censure would be unmerited. It will be remembered that these settlers had always been accustomed, from their infancy, to see all the laws and orders of government printed and published; that none of them understood the Spanish language; and that there were no translators but Austin and the secretary; and consequently that every thing had to pass through, and from them; that there was no way of publishing any thing except by manuscript copies. Also, it was natural, as regards the twelve and a half cents per acre, for the settlers to make a gross calculation of the amount, that all the land distributed in the colony would come to, and suppose that all that sum was to go into the pockets of Austin, for they made no allowance for many of the settlers who would be unable to pay any thing, at least for many years; neither did they make allowance for the incalculable loss on payments in produce, and property, at double, and treble, its cash value; neither were they competent to make any calculation at all, as to the amount which he had spent, and was still compelled to spend, to complete the titles, and keep the local government in progress and safety; for on these subjects they had no data, nor any opportunity of procuring them. It will also be remembered that an

opinion prevailed, that Austin's authority was almost absolute; and that most of the settlers were strangers to him, and to each other, and uninformed as to the nature of the government as it then existed. They understood, in general terms, that it was a republic, but they did not reflect that it was an infant republic, just springing into existence, and that there had not been time to form the constitution, and to complete the organisation and details of all the various departments. Added to all this, innumerable embarrassments arose in the selecting, surveying, and distributing lands, owing to the rambling and unsettled disposition of some of the emigrants, and to the want of more specific and fixed rules on the subject, in the colonisation law, and also to the envy and jealousies which grew out of the extensive powers that were granted to Austin and the commissioner, by the 9th article of the colonisation law, and by that part of the decree of 18th February, 1823, which speaks of an increase of quantity. When all these things are duly considered, and also that duty to themselves and families, required the settlers to be cautious about incurring pecuniary responsibilities; abundant reasons may be discovered why they should think that causes for jealousy and complaints against Austin existed; they doubtless thought they were right, and acted accordingly.

A candid and impartial review of the whole matter, therefore, leads to the conclusion, that the settlers have done their duty, and have been much clearer from internal dissensions, than could be expected, under all the circumstances. They have uniformly been unshaken in their fidelity; and ready and willing to discharge their obligations as Mexican citizens; they have borne, with the most inflexible fortitude, all the privations to which their situation exposed them, and have contributed largely in laying a foundation for the future prosperity of Texas, by commencing the settlement of its wilderness. The idea, which appears to be entertained, by some persons in the United States, that the early population of Texas is composed of fugitives from other countries, is totally incorrect and unjust. It was natural to suppose that some fugitives might enter the country, and measures were taken at an early day, both by the government and by Austin, so far as his authority extended, to shield Texas from that evil. He expelled several from this colony in 1823-4, under the severest threats of corporal punishment if they returned, and in one instance, he inflicted it. This is mentioned for the sole purpose of proving, that there could not have been many of that class here, for Austin had no force but the militia, which was composed of the settlers themselves. As regards the general morality and hospitality of the inhabitants, and the commission of crime, this settlement will bear a favorable comparison with any county in the United States, however celebrated for its exemption from such crimes.

If, having escaped many perils, is to be considered as a presage, that fortune has taken this new settlement under her protection, there is abundant reason for hoping that it will prosper in future. It was

undertaken, and has been established by individual enterprise alone, without the aid of strong capitalists, and totally unsupported by troops, or succors of any kind, from government. In this respect, it presents an anomaly, in the history of similar establishments. Independent of the perils from hostile Indians, scarcity of provisions, internal dissensions, and many others, incident to an infant and wilderness settlement; it has seen four great political changes in the government of this nation, and it has worked its way in peace and safety through them all. Those changes were from the despotic government of Spain to the independent government under the regency, in 1821-22, from that to the imperial government in 1822-23, from that to the republic under the supreme executive power, in 1823-24, and from that to the federal system, which now exists.

The foregoing observations have been exclusively confined to the first, or "old colony," as it is frequently called. The colonisation laws which are generally in force at this time, will now be noticed, and also the contracts entered into, with the government, by Austin, under those laws, in order that the emigrants who have been settled, or who may wish to settle under said contracts, may fully understand the subject, and the nature of their titles.

In order to give a clear idea of the authority which enacted those laws, the decrees of congress establishing the federal system, will be first referred to.

On the 17th June, 1823, congress decreed that a new constituent congress should be elected by the people, for the express purpose of adopting the form of government, forming the constitution, and organising the nation, agreeably to the will of the people; which would be fairly expressed by said new congress, thus elected for that purpose. The members of the first congress were ineligible to be elected for the second.

On the 19th of the same month, congress passed a resolution directing the supreme executive power, to inform the people that the then existing congress were in favor of the federal republican system of government, but had not formally adopted that system, and proceeded to form the constitution, because it had decreed on the 17th, that a new congress should be elected for that purpose.

The first congress finally closed its sessions on the 30th of October, and the second constituent congress, whose members had been elected in virtue of the decree of 17th June, convened and opened its sessions on the 5th of November. On the 31st of January, 1824, congress decreed the "*Acta Constitutiva de la Federacion Mexicana*," or act of confederation, by which the federal system was formally adopted, and the basis and outlines of the government established. The federal constitution, however, was not finally sanctioned and promulgated until the 4th of October.

On the 7th of May, congress decreed that the former provinces of Coahuila and Texas should form a state and proceed immediately to elect its legislature; but that so soon as the latter should be in a

situation to form a separate state of itself, the national congress should be informed thereof for its resolution.

It will be remembered that the colonisation law, passed by the imperial government on the 4th of January, 1823, was suspended on the 11th of April of that year, except in Austin's case. On the 18th of August, 1824, congress passed the general colonisation law, which is now in force, giving to the states full authority to form colonisation laws, and to dispose of the vacant lands within their respective limits agreeably to the basis and conditions therein established. (20) In virtue of this law, the legislature of the state of Coahuila and Texas passed the state colonisation law, which was approved by the governor, and promulgated the 24th of March, 1825, and is now in force. (21)

In 1824, there was no mail established from Bexar to Nacogdoches, passing through this place, as at this time, and the law of the 18th of August was not received here until December: previous to that time, and on the 6th of November, Austin forwarded a petition addressed to the supreme executive power of the nation, asking for authority to colonise two or three hundred families more, in addition to his first colony, and praying that Galveston might be made a port of entry. This representation was transmitted to the governor of the state. Afterwards having seen the law of the 18th of August, and understanding that a state law was discussing in the legislature of the state, he forwarded a petition addressed to the governor of the state, on the 4th of February, 1825, repeating in substance what he had said in that of the 6th of November, relative to Galveston, and asking for permission to colonise three hundred families. Having afterwards received information that the state colonisation law was about to be sanctioned, and having heard nothing of his two former petitions, on the 4th of April, 1825, he forwarded a third petition to the governor of the state asking for authority to colonise five hundred families. Before the last petition reached him the governor had granted his former one for the additional three hundred families, and had transmitted to Austin the contract which he was required to sign, and which was to take effect from the day he (Austin) approved and signed it, which he did on the 4th of June, 1825. (22) After despatching from Saltillo said contract for three hundred families, the governor received Austin's petition of 4th April, asking for authority to colonise five hundred families, which was granted by him on the 20th May, 1825, and made a part of the before-mentioned contract, which was thus extended to five hundred, instead of three hundred families. (23) The said five hundred families were to be settled on the vacant land remaining within the limits of his first colony, which had not been assigned to any other empresario, and which was not within

(20) (21) See translations of said laws.

(22) See the governor's official letter, and the contract on file in the records—translated. Galveston was made a port of entry by law, 17th October, 1825.

(23) See the governor's official letter on file—translated.

the ten league reserve on the coast. As the limits of the first colony were not fixed by specific boundaries, as before stated, Austin petitioned the governor on the subject, who, on the 7th of March, 1827, added another article to the contract, for said five hundred families, by which the limits, within which they were to be settled, were fixed. (24) The term of six years from the 4th June, 1825, the day on which Austin signed it, is fixed for the completion of this contract for five hundred families. On the 1st of April, 1826, the government commissioned Gasper Flores, commissioner for issuing titles in said colony, for five hundred families. (25)

On the 20th November, 1827, Austin entered into another contract with the government of the state, for one hundred families to be settled on the east side of the Colorado, above the San Antonio road. The contract expires six years from its date. (26)

On the 5th June, 1826, Austin petitioned the president for permission to colonise the vacant land lying within the ten league reserve, on the coast from Labaca to San Jacinto, and on the 22d of April, 1828, the president granted said petition, in virtue of which, a contract was entered into by Austin with the state government to settle three hundred families within said ten league reserve, which contract expires six years from the 29th July, 1828, that being the day on which he signed said contract. Austin is also appointed the government commissioner, for surveying the land, and issuing titles to said three hundred families, within said ten league reserve colony. (27)

It is not considered necessary to make any remarks on the national law of 18th August, 1824, on the state law of 25th March, 1825, nor on the contracts or the instructions to Austin, as commissioner of the reserve lands on the coast, for translations of them all are herein published;—here this introduction will therefore close.

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## ADVERTISEMENT.

In the foregoing introduction, I have endeavored to present to my companions and fellow laborers in the first settlement of this wilderness, a faithful history of their land titles, which was considered necessary for the better understanding of the laws, decrees, &c., herein published. This matter was so closely connected with the agency which my deceased father and myself have had in procuring the titles, that one could not be fully explained without giving a detailed account of the other; which, it is hoped, will be a sufficient apology

(24) See said additional article on file—translated.

(25) See said commission on file—translated.

(26) See said contract on file, not translated, because it is in substance the same as the other, with the difference that it directs the founding a town at the crossing of the road on the Colorado river, and specially authorises Austin to locate the settlers on their land; the titles, however, have to be issued by the government commissioner.

(27) See said contract and the instructions to him as commissioner, on file—translated.

for having noticed so minutely all his and my own acts in the business. I also considered that it was no more than justice to the settlers and to myself to place the whole matter in its true light, in order to remove any erroneous impressions which may have existed.

This colony has received the most cordial and uninterrupted manifestations of liberality, confidence, and kindness from every superior officer, who has governed the province of Texas, or the state of Coahuila and Texas, from its first commencement to the present time; and for its services on one occasion, it received in flattering terms the approbation of the president. These testimonials are too high and unimpeachable, to leave any doubt as to the morality, honor and integrity of the great mass of the settlers. But to say that there are no bad men here would be a violation of candor and truth. There are some individuals who are exceptions to the highly honorable general character which these inhabitants justly deserve, and who are meeting their reward in the frowns of public opinion.

As stated in the introduction, the object was not to give a minute history of the colony, except so far as was necessary to a clear elucidation of the authority under which it was undertaken, and has progressed. To have entered into the particulars of all the privations, Indian expeditions, &c., would have swelled the introduction to a size, beyond what the present means of printing it would permit; and besides, such a detail would have added nothing material to an understanding of the nature and validity of the titles, except so far as it tended to prove that the settlers have fully earned, and justly deserve all the land, and privileges they have obtained. This, however, is a fact too evident to require any other proofs for its establishment, than those which are self-evident, and publicly known.

The translations have been carefully made by Mr. S. M. Williams, and myself. It is believed, that should there be any inaccuracies in them, they will be found on examination, to be more of a verbal and unimportant, than of a substantial nature: the originals, however, will always be open in the office, to the inspection of those who wish to examine them.

I should consider that I had not fully complied with my duty, were I to refrain from calling the attention of the settlers to a subject, perhaps of as much importance to them, as the acquisition of their titles has been; which is, the preservation and safe keeping of the records. Since February, 1828, all the records of the colony, except those appertaining to land titles, have been under the charge of the ayuntamiento and alcalde. The land records have remained in my charge, and will probably so continue a short time longer, when they will pass to the ayuntamiento and alcalde. It should be remembered, that those records are all in Spanish, and that all official communications with the government, must be in that language, and that neither the alcalde, nor one of the members of the ayuntamiento, understands Spanish, neither is it probable that any one will be elected for many years, who does understand it. The records of that body are now kept in a very

loose and careless manner in a log cabin, exposed to all manner of casualties. The law requires the ayuntamiento, to provide a safe building to keep the records in, and a suitable secretary, thoroughly acquainted with the Spanish and English languages, to take charge of them on his own responsibility, as well as on that of the alcalde and ayuntamiento. The law also fully authorises that body to raise funds by a municipal tax for the above purposes, and to defray the necessary expenses of the local government, and it is their duty so to do; a duty which the people owe to themselves, to their own security, and to the protection of their best interests, which are involved in the safe keeping of the records, and supporting the local government of the municipality; to pay said tax, so far as is necessary and reasonable, with promptness and cheerfulness.

It is well known that up to February, 1828, the labor and expense of the local government fell principally on me, individually, and that since that period all the Spanish part of the labor has fallen on Williams and myself, without any compensation. It is also well known, that the translating and other duties connected with the local government are sufficient to occupy all the time and attention of a secretary. Since February, 1828, I have held no office which imposes any other duty on me to aid or interfere in the local civil government, than what belongs to any other citizen. As a citizen, I advised the ayuntamiento of 1828, to resort to a municipal tax; that body thought it would be unpopular, and feared to move. I repeated the advice to the ayuntamiento of 1829, and strongly urged the vast importance of giving respectability, system, and permanency to the local government, by the creation of municipal funds, and the erection of public buildings: as the friend of the settlers, I again repeat the same advice. The municipality is without a jail, a house for public use, or a place to keep the records in; and it is also without a secretary, when it is well known that all its official business must be transacted in Spanish, and that not one of the municipal officers understood one word of that language. For two years past, the business of the ayuntamiento has been done *for* it, and not *by* it, and an excessive burden has thus been thrown upon the liberality of others. I have before stated, that all the land records would shortly pass from my hands to the alcalde and ayuntamiento; perhaps I ought to be more explicit, and to state distinctly that it is, and for some time past has been, my wish and intention to withdraw, as soon as the welfare of the colony will permit, from every kind of public charge, either direct or indirect. This course is rendered necessary by the state of my health, which is perceptibly declining; and also, by the embarrassed situation of my private affairs, which will require more of my time and attention, than I have heretofore been able to devote to them. These considerations may perhaps have caused too much anxiety to see our local government placed on a more respectable and systematic basis than it is at present; I may have wished to accelerate matters more than the resources of the country will admit, and been too far influenced by an



excess of zeal, for what I considered to be the general welfare. My motives, however, were good, and had no other object in view than general utility; and I must be permitted to say that this colony is abundantly able to support its local government with decency and energy; I must also observe that the proposed tax is fully as heavy on me, in proportion to my disposable means, as on any other person. For eight years I have endeavored to be a faithful servant to this colony; it ought not to be supposed that I am to be its slave for life. Owing to my exertions when at the seat of government in 1827, the local government of this municipality was placed exclusively in the hands of the people, sooner than it otherwise would have been; and all that I now ask, is that they will provide the necessary means of administering it, for their own welfare.

With the most sincere wishes for the continued health and prosperity of these settlers,

I remain their most obedient and faithful servant,

S. F. AUSTIN.

*San Felipe de Austin, Nov. 1, 1829.*

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### TRANSLATIONS.

\*[No. 1.]—*Official Communications from Don Antonio Martinez, Governor of Texas, to Moses Austin.*

UNDER date of 17th January, last past, the commandant general, and superior political chief of the eastern internal provinces writes to me as follows:

“Having thought proper to hear the most excellent provincial deputations, on the representation which your lordship, (*usiat*) directed to me with your official letter, No. 1110, of the 26th December last, I have just received its resolution, to which I have conformed; it is of the following tenor:”

“It will be very expedient to grant the permission solicited by Moses Austin, that the three hundred families, which he says are desirous to do so, should remove and settle in the province of Texas, but under the conditions indicated in his petition on the subject, presented to the governor of that province, and which your lordship (*usia*) transmitted to this department, with your official letter of the 16th instant. Therefore, if to the first or principal requisite of being catholics, or agreeing to become so, before entering the Spanish territory, they also add that of accrediting their good character and

\* The numbers affixed to the translated documents, refer to the corresponding numbers in the introduction.

† *Vuestra Senoria* or *usia*, in the Spanish monarchy, is applied to the nobility and persons high in office: it may be translated, *your lordship*, or *your honor*.

habits, as is offered in said petition, and taking the necessary oath to be obedient in all things to the government; to take up arms in its defence against all kind of enemies; and to be faithful to the king; and to observe the political constitution of the Spanish monarchy; the most flattering hopes may be formed, that the said province will receive an important augmentation, in agriculture, industry, and arts, by the new emigrants, who will introduce them; which is all that this deputation have to say, in reply to your lordship's aforementioned official letter."

"And I transcribe it to your lordship, for your information and corresponding effects, that you may cause the interested person to be informed thereof, by means of a person of your confidence, who you will despatch with an express; and you will at the same time, send in by said express, some copies of the decree, which I transmitted under date of yesterday, granting a pardon and amnesty to the Spanish refugees, who are on the frontier, in order that they may be restored to the bosom of their country. God preserve your lordship many years. Monterey, 17th January, 1821. Joaquin de Arredondo. 'To the governor of the province of Texas.'"

All of which I transcribe to you, for your information and satisfaction, in answer to your petition, for which purpose, and in order to inform you of the deliberations of the most excellent deputation of these provinces, I have despatched with this, a person of my confidence, who is citizen Don Erasmo Seguin; and after having arranged for the removal of said families, which you have contracted with me, it will be important for you to direct, that when said families come on, information shall be immediately given of the time of their arrival, and the place where they have stopped in this territory; and that you then come on in company with my said commissioner, in order that we may agree as to the place or places, where they may wish to establish themselves; so that I may go on there, and delineate the town, and apportion out the lands, agreeably to the families, and species of agriculture they intend to establish; and also to receive from them the beforementioned oath, in order that they may be from that time considered, as members united to the Spanish nation, and enter upon the enjoyment of the benefits which it extends, and concedes to its citizens and to Spaniards.

I also expect from the prudence which your department demonstrates, and for your own prosperity and tranquility, that all the families you introduce, shall be honest and industrious, in order that idleness and vice may not pervert the good and meritorious, who are worthy of Spanish esteem, and of the protection of this government, which will be extended to them, in proportion to the moral virtues displayed by each individual.

I also inform you, in order that you may communicate it to those who intend to emigrate, that the supreme Spanish government has just opened the port of the bay of San Bernard, for navigation, and

for introductions into this province, which measure, will doubtless be very advantageous to all, and particularly to the new settlers.

God preserve you many years,

ANTONIO MARTINEZ, Gov.

*Bexar, 8th February, 1821.*

To Mr. MOSES AUSTIN, of the new settlement.

[No. 2.]

(Same to the same.)

Having seen your representation to this government, and finding it to be conformable with its ideas, I have to inform you that, although I shall render an account of it to the supreme government, for its deliberation, still not doubting it will be approved of, you can immediately offer to the new settlers the same terms as contained in your proposals, assuring you that should the superior government make any small variation, I will in due time communicate it to you; with which I answer your aforementioned representation.

God preserve you many years,

ANTONIO MARTINEZ.

[No. 3.]

(Same to the same)

For the better regulations of the Louisiana families, who are to emigrate, and whilst the new settlement is forming, you will cause them all to understand, that until the government organises, the authority which has to govern them and administer justice, they must be governed by, and be subordinate to you; for which purpose, I authorise you as their representative, and relying on your faithful discharge of the duty. You will inform me of whatever may occur, in order that such measures may be adopted as may be necessary.

God preserve you many years,

ANTONIO MARTINEZ.

*Bexar, 24th August, 1821.*

[No. 5.]

*Colonisation Law of 1823.*

AUGUSTIN, by divine providence, and by the congress of the nation, first constitutional emperor of Mexico, and grand master of the imperial order of Guadalupe; To all who shall see these presents: Know ye, That the junta nacional instituyente of the Mexican empire, has decreed, and we sanction the following:

The Junta Nacional Instituyente of the Mexican empire, being convinced by the urgent recommendations of the government, of the necessity and importance of giving to the empire a general law of colonisation, have thought proper to decree as follows:

ART. 1. The government of the Mexican nation will protect the liberty, property and civil rights, of all foreigners, who profess the Roman Catholic apostolic religion, the established religion of the empire.

ART. 2. To facilitate their establishment, the executive will distribute lands to them, under the conditions and terms herein expressed.

ART. 3. The empresarios, by whom is understood those who introduced at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the property or resources they intend to introduce for that purpose, and any other particulars they may deem necessary, in order that with this necessary information, the executive may designate the province to which they must direct themselves, the lands which they can occupy with right of property, and the other circumstances which may be considered necessary.

ART. 4. Families who emigrate, not included in a contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

ART. 5. The measurement of land shall be the following; establishing the *vara*, at three geometrical feet; a straight line of five thousand *varas* shall be a league; a square, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two, or more sitios; five sitios shall compose one hacienda.

ART. 6. In the distribution made by government, of lands to the colonists, for the formation of villages, towns, cities, and provinces, a distinction shall be made between grazing lands, destined for the raising of stock, and lands suitable for farming or planting, on account of the facility of irrigation.

ART. 7. One labor shall be composed of one million square varas, that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two, or more labors. These labors can be divided into halves and quarters, but not less.

ART. 8. To the colonists, whose occupation is farming, there cannot be given less than one labor, and those whose occupation is stock raising there cannot be given less than one sitio.

ART. 9. The government of itself, or by means of the authorities authorised for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

ART. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

ART. 11. As one of the principal objects of laws in free governments, ought to be to approximate, so far as possible, to an equal distribution of property, the government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands, which may have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands, to be fixed by appraisers.

ART. 12. The union of many families at one place, shall be called

a village, town or city, agreeably to the number of its inhabitants, its extension, locality, and other circumstances which may characterise it, in conformity with the law on that subject. The same regulations for its internal government and police, shall be observed as in the others of the same class in the empire.

ART. 13. Care shall be taken in the formation of said new town, that, so far as the situation of the ground will permit, the streets shall be laid off straight, running north and south, east and west.

ART. 14. Provinces shall be formed, whose superfiice shall be six thousand square leagues.

ART. 15. As soon as a sufficient number of families may be united to form one or more towns, their local government shall be regulated, and the constitutional ayuntamientos and other local establishments formed in conformity with the laws.

ART. 16. The government shall take care, in accord with the respective ecclesiastical authority, that these new towns are provided with a sufficient number of spiritual pastors, and in like manner, it will propose to congress a plan for their decent support.

ART. 17. In the distribution of lands for settlement among the different provinces, the government shall take care that the colonists shall be located in those which it may consider the most important to settle. As a general rule, the colonists who arrive first, shall have the preference in the selection of land.

ART. 18. Natives of the country shall have a preference in the distribution of land; and particularly the military of the army, of the three guarantees, in conformity with the decree of the 27th of March, 1821; and also those who served in the first epoch of the insurrection.

ART. 19. To each empresario who introduces and establishes families in any of the provinces designated for colonisation, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands, should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas, and six labors, whatever may be the number of families he introduces.

ART. 20. At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing article, must alienate two thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorises him to hold in full property and dominion one third part.

ART. 21. The two foregoing articles are to be understood as governing the contracts made within six months, as after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to congress, with such information as may be deemed necessary.

ART. 22. The date of the concession for lands constitutes an inviolable law, for the right of property and legal ownership; should any

one through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

ART. 23. If after two years from the date of the concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced; in which case, the respective ayuntamiento can grant it to another.

ART. 24. During the first six years from the date of the concession, the colonists shall not pay titles, duties on their produce, nor any contribution under whatever name it may be called.

ART. 25. The next six years from the same date, they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time, they shall in all things relating to taxes and contributions, be placed on the same footing with the other citizens.

ART. 26. All the instruments of husbandry, machinery, and other utensils, that are introduced by the colonists for their use, at the time of their coming to the empire, shall be free, as also the merchandise introduced by each family, to the amount of two thousand dollars.

ART. 27. All foreigners who come to establish themselves in the empire, shall be considered as naturalised, should they exercise any useful profession or industry, by which, at the end of three years; they have a capital to support themselves with decency, and are married. Those who with the foregoing qualifications, marry Mexicans, will acquire particular merit, for the obtaining letters of citizenship.

ART. 28. Congress will grant letters of citizenship to those who solicit them, in conformity with the constitution of the empire.

ART. 29. Every individual shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country, all his property, by paying the duties established by law.

ART. 30. After the publication of this law, there can be no sale or purchase of slaves which may be introduced into the empire. The children of slaves born in the empire, shall be free at fourteen years of age.

ART. 31. All foreigners who may have established themselves in any of the provinces of the empire, under a permission of the former government, will remain on the lands which they may have occupied, being governed by the tenor of this law, in the distribution of said lands.

ART. 32. The executive, as it may conceive necessary, will sell or lease the lands, which, on account of their local situation, may be the most important, being governed with respect to all others, by the provisions of this law.

This law shall be presented to his Imperial Majesty for his sanction, publication and fulfilment.—Mexico, 3d January, 1823—3d of the independence of the empire.—Juan Francisco, Bishop of Durango,

President.—Antonio de Mier, Member and Secretary.—Juan Batista de Arispe, Member and Secretary.

Therefore, we order all tribunals, judges, chiefs, governors, and all other authorities, as well civil as military and ecclesiastical, whatever class or dignity they may be, to comply with this decree, and cause it to be complied with in all its parts; and you will cause it to be printed, published and circulated.—Given in Mexico, 4th January, 1823.—Signed by the Emperor.—To Don Jose Manuel de Herrera, Minister of Interior and Exterior Relations.

[No. 8.]

(*Decree of the Emperor.*)\*

*Mexico, February, 18, 1823.*

Having rendered an account to his majesty of the subject, on which the council has given the foregoing opinion, he has thought proper to resolve, in conformity therewith; and consequently declares, in the first place, that Austin was not officially authorised to stipulate with the emigrants what quantity of land they should receive in the new settlement, and therefore they are subject to the regulations of the government, agreeably to the law on that point; and consequently in virtue of said law, there shall be granted to each head of a family, one labor or one league, agreeably to the occupation which he may profess; offering to augment the quantity of land, for all those who may have a numerous family, or who may merit such augmentation, by the establishment of a new species of industry, or by the perfection of those already known, or by other circumstances, which may be useful to the province, or to the empire, it being understood, that to

\* After the passage of the colonisation law, by the Junta Instituyente, the memorial which Austin presented to congress soon after his arrival in Mexico, was referred to the imperial council of state, together with all the documents on the subject, who gave their opinion or advice, on which the above decree of the emperor was issued. It is not considered important to translate the whole of said opinion, for its substance is copied in the emperor's decree. The first part of it is as follows:

"The council of state in session, on the 14th of January, 1823, has examined the documents relative to the establishment of 300 Louisiana families, in the province of Texas, by Don Stephen F. Austin. His memorial on the subject embraces various points; the first is, that the government confirm to the emigrants the quantity of land promised by him to the settlers, and that the limits of the establishment should be fixed as petitioned for in his memorial. The council are of opinion that Austin was not sufficiently authorised to stipulate with the emigrants the quantity of land which they should receive in the new settlement; and consequently that they are subject to the regulations of the government, agreeably to the law on that point; and besides, the 10th article of the colonisation law prescribes that of matters on this subject which might be pending, although they may have been commenced under the former government, shall be regulated by that law; and the 8th article of said law prescribes, &c. [Here the council states the substance of the 8th and 9th articles of the said law, and advises the emperor to order the distribution of land to the settlers, in conformity thereto.] As regards the limits of the colony, the council say, "with respect to the demarcation of the limits for the new establishment, described by Austin in his memorial, the council are of opinion that it need not be granted, because there is not sufficient data to ascertain the extent of territory embraced by said limits, and also, because there is no motive or necessity for such demarcation, for the colony will, of course, be composed of the lands granted in full property to the colonists."

the colonist, who besides farming also dedicates himself to the raising of stock, there may be granted a league and a labor, in conformity with the 8th article of said law. As respects the designation of boundaries for the new establishment, with the limits described by Austin in his memorial, it is declared to be inadmissible, for the reasons given by the council.

In the second place, Austin is authorised, in union with the governor of Texas, or a commissioner appointed by the latter, to proceed to divide and designate land, and put each of the new colonists in possession of the quantity above indicated, and issue to them the titles in the name of the government. A certified copy of which shall be transmitted to the governor, for the purpose connected with the subject.

In the third place, all the families over and above the said three hundred, who come to settle in Texas, must establish themselves in the interior of the province, adjacent to the ancient settlements, in the manner prescribed by the colonisation law.\*

In the fourth place, and conformity with the said colonisation law, there is granted to Austin, for the expenses which he has been at, a quantity of land in proportion to his families, agreeably to the provisions of the 19th article of said law, and under the conditions contained in said article.

In the fifth place, Austin is authorised to proceed in conformity with said law, to form a town, with the families who have emigrated, or may emigrate, to the number of the three hundred of the permission, at the most suitable place in the section of country which they at present occupy, taking care that it shall be as central as possible, to the lands distributed to the colonists, who must accredit that they are Roman apostolic catholics, and of steady habits. It being understood that the governor of Texas, or his commissioner, in union with Austin, can designate the place, and measure out the land for the establishment of said town; selling the building lots, at the price to be regulated by appraisers, the other particulars embraced under this head, which were petitioned for by Austin, are granted; the governor of Texas is required to give information, of whatever may be necessary for the regulation of the government of said town, and that both it, and any others that are founded, may be furnished with spiritual pastors.

As regards the citizenship which Austin solicits, he is notified to apply to the Junta Nacional Instituyente, whose province it is to grant it.

And finally, he is authorised to organise the colonists into a body

\* Austin petitioned for authority to introduce and settle an additional number of emigrants, besides the three hundred:—the substance of the opinion given by the council, on this point, is, that it would be expedient to make such an additional or new contract with Austin, provided such new emigrants settled in the interior of Texas, and in the immediate neighborhood of the old settlements of that province, retired from the eastern frontier, but not otherwise.



of national militia, to preserve tranquillity, rendering an account of all to the governor of Texas, and acting under his orders, and those of the captain general of the province; also, until the government of the settlement is organised, he is charged with the administration of justice, settling all differences which may arise among the inhabitants, and preserving good order and tranquillity; rendering an account to the government of any remarkable event that may occur.

ANDRES QUINTANA.

Copy of the fifth article of the memorial of Stephen F. Austin, relative to colonisation in the province of Texas, which was granted in the manner stated in the foregoing decree:

That authority be granted to him, to found one or more towns, at such points as he may deem most proper, within the limits designated, and to take for himself, and for his family, sufficient lots for their uses, and with power to grant lots to useful mechanics, gratis; but that all others should pay for them, at the price the government may think proper to establish; the proceeds of which shall be applied to the building of a church, and other establishments of public utility.

I certify the above to be a copy from the original.

MIGUEL RIESGO, *Official Primero*.

Mexico, 18th Feb., 1823.

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[No. 11.] *Decree of the Sovereign Congress.*

Most excellent Sir:—Having seen the reasons which the empresario, S. F. Austin, has given in his last representation, praying that the concession made to him, by the late government, for the establishment of three hundred families in Texas, should be confirmed: The sovereign constituent congress have thought proper to resolve, that the said petition should be transmitted to the executive, in order that should it have no objections, it may grant this petition, and any others of the same kind;—also, the sovereign congress have determined, that hereafter, the colonisation law, passed by the Junta Instituyente, shall be suspended until a new resolution on the subject. And by order of the sovereign congress, we communicate this to your excellency, accompanied by the said petition.—God preserve your excellency many years.—Mexico, 11th April, 1823.

FLORENTINO MARTINEZ,  
*Member and Secretary.*

JOSE MARIA SANCHEZ,  
*Member and Secretary.*

To his excellency, the Minister of Interior and Exterior Relations.

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[No. 12.] *Decree of the Supreme Executive Power.*

Mexico, 14th April, 1823.

Having seen the new representation of Stephen F. Austin, praying for a confirmation of the concession granted to him by the late government, by its decree of 18th February last, relative to colonisation

in the province of Texas; and finding it to be in conformity with the law passed on the subject, by the Junta nacional instituyente; the supreme executive power have thought proper to confirm the said concession, and order that the corresponding title should be given to the interested person, and that the resolution should be communicated to the commandant general of the internal provinces, and to the governor of the province of Texas, for their information and the corresponding effects.

JOSE IGNACIO GARCIA ILLUECA,  
*Minister of Relations.*

[No. 14.] *Commission of the Baron de Bastrop.*

*San Fernando de Bexar, 16th July, 1823.*

Inasmuch as the more important attentions of government prevent my executing, in person, the various duties connected with the colonial establishment forming by Stephen F. Austin, and using the power granted to me by the laws, and in obedience to the decree of the commandant general of these provinces, brigadier Don Felipe de la Garza, dated 16th June last past,\* I have thought proper to appoint, and by these presents, do appoint the second alcalde of this city, the Baron de Bastrop, commissioner, giving to him all legal powers, to proceed to the district of the Colorado and the Brazos, to organise that establishment, in conformity with the decrees on the subject, and such instructions as I may communicate:—a certified copy of which is herewith delivered to him, in order that in continuation he may proceed to discharge the duties which may be necessary, transmitting a statement of his proceedings when they are finished, to this government, for the purposes which may be necessary.

Thus, I, Luciano Garcia, lieutenant colonel of cavalry of New Santander, and governor pro tem., of this province, order and command, signing the present with assisting witnesses, for the want of a notary public, as the law requires; to which I give faith.

LUCIANO GARCIA.

*Assisting witnesses.*—Jose Antonio Saucedo, and Ilario de la Garza.

*Official letter from Governor Garcia, to S. F. Austin, on the same subject.*

As the more important attentions of the government, prevent my going on personally to organise the colonial establishment, forming

\* The decree of the commandant general referred to, is his official communication, at the end of the documents on the subject, including the consultation made by Austin to him, and the proceedings of the deputation thereon, mentioned in page 568 in the introduction. The commandant general at the close says, "A certified copy of which shall be delivered to Austin for his government, and the original shall be transmitted to the governor of Texas, who will appoint the commissioner mentioned in the decree of 18th February 1823: and see that said colonial establishment is formed in the manner therein directed."

by you in this province, I have thought proper to commission, with all necessary powers, the second alcalde of this city, Baron de Bastrop, who has been selected on account of his well known and superior qualifications, in order that in conformity with the decrees on the subject, and the colonisation law, copies of all which I have delivered to him, and also in conformity with such instructions as may in future be communicated to him, he shall proceed to organise said establishment:—which I communicate to you for your information, in order that in accord with said commissioner, you may appoint a day for your departure from this place, and inform me thereof, that I may have the escort ready to accompany you.—God and liberty.—Bexar, 28th July, 1823.

LUCIANO GARCIA.

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[No. 15.] *Official Letter from Governor Garcia, to the Commissioner Bastrop, naming the town of San Felipe de Austin.*

Under date of the 22d inst., I reported to the commandant general of these provinces as follows:—

“In virtue of your official communication of the 16th ultimo, transmitting to me the documents relative to the colonial establishment, forming in this province, by Don Stephen F. Austin, of three hundred families, the receipt of which I acknowledged, by my letter of the 9th inst.—I have commissioned the second alcalde of this city, Baron de Bastrop, on account of his geographical knowledge, and his understanding the English language, to proceed to the organisation of said establishment, in conformity with the aforementioned documents on the subject, and with such instructions as it may hereafter be necessary to give him; and also to lay out the town, and survey the lands for lots, farms, and stock farms. The name which I have given to the town, but subject to your determination, is San Felipe de Austin, and for its greater formality, should you deem it necessary, I wish the corresponding approval transmitted to me, in order that the commissioner may proceed to execute what may be necessary.”

Which I transcribe to you for your information, accompanied with a copy of the colonisation law, in order that, in the discharge of your commission, you will be governed by it, and by the decrees which I have already communicated to you, as also by such instructions as may be necessary to give. You will therefore inform me of the day fixed for your departure, in order that the escort of soldiers, who are to accompany you, may be ready.—God and Liberty.

LUCIANO GARCIA.

Bexar, 26th July, 1823.

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[No. 16.] *Official Letter of the Commissioner Bastrop, to James Cummings, provisional alcalde, on the Colorado.*

The governor pro tem. of this province, Lieutenant Colonel Don

Luciano Garcia, under date of the 16th of last month, says to me as follows:—

“The commandant general of these provinces, Brigadier Don Felipe de la Garza, under date of the 16th of June, last past, says to me as follows:

“I transmit to you the documents relative to the colonial establishment, which Don Stephen F. Austin is permitted to form in that province, in order that, on your part, you give due compliance to the decree of the last government, dated 18th February last past, resanctioned by the present government on the 14th April, and by me under this date. You will use all possible efforts to complete the organisation of said establishment; charging the commissioner who may be appointed by you to be expeditious in concluding his duties, and that he make frequent reports of his progress, in order that you may do the same to me, and on its conclusion you will inform me thereof.”

“And I transcribe it to you for your information, and that in virtue of the commission which I have conferred upon you, by my decree of this date, you will proceed in company with said Austin to organise the colonial establishment which the government has granted to him in this province, for three hundred Louisiana families. You will be governed in all things by the decrees and orders contained in the certified copy of them, which I have delivered to you, and by such other instructions as it may be necessary to communicate to you until said establishment is organised, and ayuntamientos are established at the places where they may be necessary. The said Don Stephen F. Austin is authorised by the government to administer justice in that district, and to form a regiment of national militia, over which, for the present, he must be the chief, with the rank of lieutenant colonel; all of which you will make known to the inhabitants of said district, in order that they may recognise the said Austin, invested with said powers, and obey whatever he may order relative to the public service of the country, the preservation of good order, and the defence of the nation to which they belong.”

And I transcribe it to you for your information, and strict compliance on your part; notifying you, that on Saturday, the 9th instant, you will collect as many of the inhabitants of the district under your charge as you can, at the house of Sylvanus Castleman, that I may communicate to them the superior orders with which I am charged, and that said Don Stephen F. Austin may be recognised by the civil and military authorities dependent on him, and by the new colonists who are under his charge.—God preserve you many years.—At Castleman's, August 5th, 1823.

EL BARON DE BASTROP.

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[No. 17.] *Official Letter from Jose Antonio Saucedo, political chief of Texas, to Austin.*

Under this date I have transmitted to the alcaldes of the Colorado and Brazos, the following order:—

"The Baron de Bastrop, the commissioner of this government, proceeds to that district, to put the inhabitants established in it in possession of their lands agreeably to law, and to issue to them the corresponding titles for their security, so soon as they pay the fees established by the fee bill, which I circulated when I was at that point; which I communicate to you for your information, and in order that there may be no delay in the organisation of that establishment, you will notify all the inhabitants who wish to settle in it that they must positively assemble on the day, and at the place fixed by said commissioner, to put them in possession of their lands, and issue the titles therefor. And you will make the corresponding report of the receipt and execution of this order."

Which I communicate to you for your information and necessary purposes.—God and Liberty.—San Fernando de Bexar, 23d June, 1824.  
JOSE ANTONIO SAUCEDO.

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*Same to the Same.*

The great scarcity of public funds under which this province is suffering, and the urgent necessities at this time felt by its representative bodies, has compelled the Baron de Bastrop, sixth member of the most excellent deputation, to undertake the fatiguing journey to that place, to collect as much as possible of fees belonging to the nation, agreeably to the fee bill, which I left with you, on the lands granted to those inhabitants, and also for the purpose of issuing titles to them, as the commissioner of this government, in union with yourself. You will in both cases use every possible exertion to carry these measures into due effect, for thus the good of the country requires.—God and Liberty.—San Fernando de Bexar, 22d June, 1824.  
JOSE ANTONIO SAUCEDO.

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*Same to the Same, relative to Stamp Paper.*

I send you a copy of the law relative to stamp paper, in order that in conformity therewith, those inhabitants may make out their petitions for lands, on the corresponding stamp, and that the titles may be issued to them on the stamp prescribed by law. And as there is not a sufficiency of stamps in the depot of this city, I authorise you to stamp as much common paper as may be necessary for those inhabitants, doing it by means of a line at the top of each sheet, with these expressions: "*Sello 30. 4rrs. Habilitado par la Nacion Mexicana para el ano de 1824, Austin.*" Signing it with your surname only. After which the interested person shall take the same paper to the alcalde of the district, who, as the provisional collector of the revenue, shall collect its value, and put on the margin of each

\* Seal 3d, four bits; stamped by the Mexican nation for the year 1824.

sheet the following expressions: "*Pago el interesado en este juzgado de mi cargo les cuatro reales importe del Sello anterior.*"\* Date and signature of the alcalde. The same will be observed with regard to stamps of the other classes. To avoid mistakes, you must keep a circumstantial account of the paper stamped by you, and the alcalde will in like manner, keep an account of the amount collected by him, and each one will make a return thereof, to the government, at the end of the year, without, however, delaying to remit the proceeds, as soon as possible, by any safe opportunity that may present.—God and Liberty.—San Fernando de Bexar, 22d June, 1824.

JOSE ANTONIO SAUCEDO.

[No. 18.] *Appointment of Gasper Flores, as Commissioner, in the place of Baron de Bastrop.*

His excellency, the lieutenant governor of the state, under date of 7th February last past, says to me as follows:—

"It being impossible for Don Felipe Henrique Neri Baron de Bastrop the former commissioner of the first colony of the empresario, citizen Stephen F. Austin, to leave this capital to conclude the unfinished business of said colony, as well on account of his station as a member of the legislature, as also because he is dangerously ill; I have thought proper to determine in consequence of your official representation, No. 11, of the 16th January last past, and with the consent of said Bastrop, to authorise citizen Gasper Flores, who has been commissioned by the government, for the second colony of said empresario, to complete the business which may be unfinished, in the said first colony, which you will communicate to said citizen, Gasper Flores, for his information and corresponding effects."

And I transcribe it to you for the purpose indicated.—God and Liberty.—Nacogdoches, 19th March, 1827.

JOSE ANTONIO SAUCEDO,  
Chief of Department.

To citizen GASPER FLORES.

[No. 19.] *Order relative to the Register.*  
*Executive Department, of the State of Coahuila and Texas.*

Under this date I have issued the following order, to citizen Gasper Flores, commissioner of that colony.

"Having considered the official representation, dated 5th ultimo, directed to me by citizen Stephen F. Austin, empresario of Austin's colony, in that department, relative to the mode of preventing the original documents of that colony from being lost or destroyed by the lapse of time, I have thought it proper to approve of it, and in consequence, order that the following articles shall be observed on the subject, which are in addition to the instructions heretofore given to you.

\* The interested person has paid into this office, under my charge, four bits, the value of the above stamp.

ART. 1. In order to preserve and perpetuate the documents appertaining to the first enterprise of colonisation of the empresario, citizen Stephen F. Austin, in Texas, established in virtue of the supreme decree of the Mexican government, dated 18th February, 1823; of which you are appointed commissioner, in the place of the former commissioner, Baron de Bastrop, all the said documents shall be transcribed, together with the decrees of the government on the subject, and the titles issued in virtue of them, to individuals, and to said empresario, accompanied with a plot of each tract of land, and of the town of San Felipe de Austin, in a large book, well bound, and destined for that object.

ART. 2. At the top of the first page of said book, the following words shall be written, "Register of the documents and titles, issued in the first enterprise of colonisation of the empresario, citizen Stephen F. Austin, in Texas," which shall be signed by the commissioner, empresario and alcalde, of the town, with assistant witnesses.

ART. 3. At the end of each document, and title, the following words shall be put: "The foregoing instrument of writing, is literally copied from its original, which is on file in the archives of this colony;" date and signature of the commissioner, empresario, and alcalde, with assistant witnesses.

ART. 4. At the end of the register of the whole, the following words shall be put: "The foregoing register, composed of—pages, contains literal and exact copies of all the documents and titles filed in the archives of the first colony of the empresario, citizen Stephen F. Austin, established in Texas, in virtue of the colonisation law, of the 4th January, 1823, and of the decree of the supreme government of the Mexican nation, of the 18th of February, confirmed by those of the sovereign constituent congress, and supreme executive power, dated the 11th and 14th April of the said year 1823, which are copied into this book, and compared with their originals, by the commissioner, citizen Gaspar Flores, empresario citizen Stephen F. Austin, and the alcalde of this town, in compliance with the instructions of his excellency, the governor of the state of Coahuila and Texas, dated 31st of May, 1827, for the purpose of preserving and perpetuating said documents in the archives of said colony in a secure form, in order that they may at all times have the same value and legality in law, as their originals: in attestation of all which, we, the said commissioner, empresario, and alcalde, sign, &c. &c."

"Inasmuch as I am informed that the book destined for this object, is already acquired by the empresario, and that the stamp paper on which the original titles are extended, has been paid for;—the said book shall be stamped by the collector of the stamp duties of the town of San Felipe de Austin, with the stamp of the fourth seal; and he will collect the value of one stamp for each leaf, for which purpose he will put the corresponding certificate, on the first and last leaf, expressing in the latter the whole amount of stamps collected, which shall be entered in the accounts of his office."

Which I transcribe to you for your intelligence and observance, so far as appertains to you in answer to your official representation of the 5th of last month, relative to the matter.—God and Liberty.—Saltillo, 31st May, 1827.

ARISPE, *Governor of the State.*

JUAN ANTONIO PADILLA, *Secretary of State.*

To Citizen STEPHEN F. AUSTIN.

[No. 20.] (Decree No, 72.) *National Colonisation Law.*

The Supreme Executive Power, provisionally appointed by the general sovereign Constituent Congress—To all who shall see and understand these presents: Know ye—that the said Congress has decreed as follows:—

ART. 1. The Mexican nation offers to foreigners, who come to establish themselves within its territory, security for their persons and property, provided, they subject themselves to the laws of the country.

ART. 2. This law comprehends those lands of the nation, not the property of individuals, corporations, or towns which can be colonised.

ART. 3. For this purpose the legislatures of all the states will, as soon as possible, form colonisation laws, or regulations for their respective states, conforming themselves in all things, to the constitutional act, general constitution, and the regulations established in this law.

ART. 4. There cannot be colonised any lands, comprehended within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coasts, without the previous approbation of the general supreme executive power.

ART. 5. If for the defence and security of the nation, the federal government should deem it necessary to use any portion of these lands, for the construction of warehouses, arsenals, or other public edifices, they can do so, with the approbation of the general congress, or in its recess, of the council of government.

ART. 6. Until after four years from the publication of this law, there shall not be imposed any tax whatever, on the entrance of foreigners, who come to establish themselves for the first time in the nation.

ART. 7. Until after the year 1840, the general congress shall not prohibit the entrance of any foreigner, as a colonist, unless imperious circumstances should require it, with respect to the individuals of a particular nation.

ART. 8. The government, without prejudicing the objects of this law, shall take such precautionary measures as it may deem expedient, for the security of the confederation, as respects the foreigners who come to colonise.

ART. 9. A preference shall be given in the distribution of lands, to Mexican citizens, and no other distinction shall be made in regard to them except that which is founded on individual merit, or services



rendered the country, or under equal circumstances, a residence in the place where the lands to be distributed are situated.

ART. 10. The military who in virtue of the offer made on the 27th March, 1821, have a right to lands, shall be attended to by the states, in conformity with the diplomas which are issued to that effect, by the supreme executive power.

ART. 11. If in virtue of the decree alluded to, in the last article, and taking into view the probabilities of life, the supreme executive power should deem it expedient to alienate any portion of land in favor of any officer, whether civil or military of the federation, it can do so from the vacant lands of the territories.

ART. 12. It shall not be permitted to unite in the same hands with the right of property, more than one league square of land, suitable for irrigation, four square leagues in superficies, of arable land without the facilities of irrigation, and six square leagues in superficies of grazing land.

ART. 13. The new colonists shall not transfer their property in mortmain (*manus muertos*.)

ART. 14. This law guarantees the contracts which the empresarios make with the families which they bring at their own expense, provided they are not contrary to the laws.

ART. 15. No person who by virtue of this law, acquires a title to lands, shall hold them if he is domiciliated out of the limits of the republic.

ART. 16. The government in conformity with the provisions established in this law, will proceed to colonise the territories of the republic.

*Mexico, 18th August, 1824.*

CAYETANO IBARRA, *President.*

PEDRO DE AHUMADA, *Member and Secretary.*

MANUEL DE VILLAY COCIO, *Member and Secretary.*

Therefore, we command it to be printed, circulated, and obeyed.

NICHOLAS BRAVO,	} Members of the
VICENTE GUERRERO,	
MIGUEL DOMINGUEZ.	

Supreme Executive Tower.

[No. 21.] *Colonisation law of the state of Coahuila and Texas.*

The Governor provisionally appointed by the Sovereign Congress of this state; to all who shall see these presents: Know, that the said congress, have decreed as follows:

Decree No. 16. The constituent congress of the free, independent and sovereign state of Coahuila and Texas, desiring by every possible means, to augment the population of its territory; promote the cultivation of its fertile lands; the raising and multiplication of stock, and the progress of the arts, and commerce; and being governed by the constitutional act, the federal constitution, and the basis established by the national decree of the general congress,

No. 72, hav ethought proper to decree the following LAW OF COLONISATION:

ART. 1. All foreigners, who in virtue of the general laws of the 18th August, 1824, which guarantees the security of their persons and property, in the territory of the Mexican nation, wish to remove to any of the settlements of the state of Coahuila and Texas, are at liberty to do so; and the said state invites and calls them.

ART. 2. Those who do so instead of being incommoded, shall be admitted by the local authorities of said settlements, who shall freely permit them to pursue any branch of industry, that they may think proper, provided they respect the general laws of the nation, and those of the state.

ART. 3. Any foreigner, already in the limits of the state of Coahuila and Texas, who wishes to settle himself in it, shall make a declaration to that effect, before the ayuntamiento of the place, which he selects as his residence, the ayuntamiento in such case, shall administer to him the oath, which he must take to obey the federal and state constitutions, and observe the religion which the former prescribes; the name of the person, and his family if he has any, shall then be registered in a book kept for that purpose, with a statement of where he was born, and whence from, his age, whether married, occupation, and that he has taken the oath prescribed, and considering him from that time, and not before, as domiciliated.

ART. 4. From the day in which any foreigner has been enrolled, as an inhabitant, in conformity with the foregoing article, he is at liberty to designate any vacant land, and the respective political authority will grant it to him in the same manner as to a native of the country, in conformity with the existing laws of the nation, under the condition that the proceedings shall be passed to the government for its approbation.

ART. 5. Foreigners of any nation, or a native of any of the Mexican states, can project the formation of new towns on any lands entirely vacant, or even on those of an individual, in the case mentioned in the 35th article; but the new settlers who present themselves for admission, must prove their christianity, morality, and good habits, by a certificate from the authorities where they formerly resided.

ART. 6. Foreigners who emigrate at the time in which the general sovereign congress may have prohibited their entrance, for the purpose of colonising, as they have the power to do, after the year 1840, or previous to that time, as respects those of any particular nation, shall not then be admitted; and those who apply in proper time, shall always subject themselves to such precautionary measures of national security, which the supreme government, without prejudicing the object of this law, may think proper to adopt relative to them.

ART. 7. The government shall take care, that within the twenty leagues bordering on the limits of the United States of the North, and ten leagues in a straight line from the coast of the Gulf of Mexico, within the limits of this state, there shall be no other settlements,

except such as merit the approbation of the supreme government of the Union, for which object, all petitions on the subject, whether made by Mexicans or foreigners, shall be passed to the superior government, accompanied by a corresponding report.

ART. 8. The projects for new settlements in which one or more persons offer to bring at their own expense, one hundred or more families, shall be presented to the government, and if found conformable with this law, they will be admitted; and the government will immediately designate to the contractors, the land where they are to establish themselves, and the term of six years, within which they must present the number of families they contracted for, under the penalty of losing the rights and privileges offered in their favor, in proportion to the number of families which they fail to introduce, and the contract totally annulled if they do not bring at least one hundred families.

ART. 9. Contracts made by the contractors or undertakers, *Empresarios*, with the families brought at their expense, are guaranteed by this law, so far as they are conformable with its provisions.

ART. 10. In the distributions of land, a preference shall be given to the military entitled to them, by the diplomas issued by the supreme executive power, and the Mexican citizens who are not military, among whom there shall be no other distinction, than that founded on their individual merit, or services performed for the country, or in equal circumstances, a residence in the place where the land may be situated; the quantity of land which may be granted, is designated in the following articles:

ART. 11. A square of land, which on each side has one league or five thousand varas, or what is the same thing, a superficies of twenty-five million varas, shall be called a sitio, and this shall be the unity for counting one, two, or more sitios; and also the unity for counting one, two, or more labors, shall be one million square varas, or one thousand varas on each side, which shall compose a labor. The vara for this measurement shall be three geometrical feet.

ART. 12. Taking the above unity as a basis, and observing the distinction which must be made between grazing land, or that which is proper for raising of stock, and farming land, with or without the facility of irrigation; this law grants to the contractor or contractors, for the establishment of a new settlement, for each hundred families which he may introduce and establish in the state, five sitios of grazing land, and five labors at least, the one half of which, shall be without the facility of irrigation, but they can only receive this premium for eight hundred families, although a greater number should be introduced, and no fraction whatever, less than one hundred, shall entitle them to any premium, not even proportionally.

ART. 13. Should any contractor or contractors in virtue of the number of families which he may have introduced, acquire in conformity with the last article, more than eleven square leagues of land, it shall nevertheless be granted, but subject to the condition of alien-

ating the excess, within twelve years, and if it is not done, the respective political authority shall do it, by selling it at public sale, delivering the proceeds to the owners, after deducting the costs of sale.

ART. 14. To each family comprehended in a contract, whose sole occupation is cultivation of land, one labor shall be given; should he also be a stock raiser, grazing land shall be added to complete a sitio; and should his only occupation be raising of stock, he shall only receive a superfice of grazing land, equal to twenty-four million square bars.

ART. 15. Unmarried men shall receive the same quantity when they enter the matrimonial state, and foreigners who marry native Mexicans, shall receive one-fourth more; those who are entirely single, or who do not form a part of some family whether foreigners or natives, shall content themselves with the fourth part of the above mentioned quantity, which is all that can be given them until they marry.

ART. 16. Families or unmarried men who, entirely of their own accord, have emigrated and may wish to unite themselves to any new towns, can at all times do so, and the same quantity of land shall be assigned them, which is mentioned in the last two articles, but if they do so in the first six years from the establishment of the settlement, one labor more shall be given to families, and single men in place of the quarter designated in the 15th article, shall have the third part.

ART. 17. It appertains to the government to augment the quantity indicated in the 14, 15, and 16th articles, in proportion to the family, industry and activity of the colonists, agreeably to the information given on these subjects by the ayuntamientos and commissioners; the said government always observing the provision of the 12th article, of the decree of the general congress on the subject.

ART. 18. The families who emigrate in conformity with the 16th article shall immediately present themselves to the political authority of the place which they may have chosen for their residence, who finding in them the requises, prescribed by this law for new settlers, shall admit them, and put them in possession of the corresponding lands, and shall immediately give an account thereof to the government; who of themselves, or by means of a person commissioned to that effect, will issue them a title.

ART. 19. The Indians of all nations, bordering on the state, as well as wandering tribes that may be within its limits, shall be received in the markets, without paying any duties whatever for commerce, in the products of the country; and if attracted by the moderation and confidence, with which they shall be treated, any of them, after having first declared themselves in favor of our religion and institutions wish to establish themselves in any settlements that are forming, they shall be admitted, and the same quantity of land given them, as to the settlers, spoken of in the 14th and 15th articles, always preferring native Indians to strangers.

ART. 20. In order that there may be no vacancies between tracts, of which, great care shall be taken in the distribution of lands; it shall be laid off in squares, or other forms although irregular, if the local situation requires it; and in said distribution, as well as the assignation of lands for new towns, previous notice shall be given to the adjoining proprietors, if any, in order to prevent dissensions and law suits.

ART. 21. If by error in the accession, any land shall be granted, belonging to another, on proof being made of that fact, an equal quantity shall be granted elsewhere, to the person who may have thus obtained it through error, and he shall be indemnified by the owner of such land, for any improvements he may have made; the just value of which improvements shall be ascertained by the appraisers.

ART. 22. The new settlers as an acknowledgement, shall pay to the state, for each sitio of pasture land, thirty dollars; two dollars and a half for each labor without the facility of irrigation, and three dollars and a half for each one that can be irrigated, and so on proportionally according to the quantity and quality of the land distributed; but the said payments need not be made, until six years after the settlement, and by thirds; the first within four years, the second within five years, and the last within six years, under the penalty of losing the land, for a failure, in any of said payments; there are excepted from this payment, the contractors, and military, spoken of in the 10th article; the former, with respect to lands given them, as a premium, and the latter, for those which they obtained, in conformity with their diplomas.

ART. 23. The ayuntamientos of each municipality (*Comarca*,) shall collect the abovementioned funds, gratis, by means of a committee, appointed either within or without their body; and shall remit them as they are collected, to the treasurer of their funds; who will give the corresponding receipt, and without any other compensation than two and a half per cent., all that shall be allowed him, he shall hold them at the disposition of the government, rendering an account every month of the ingress and egress, and of any remissness or fraud, which he may observe in their collection, for the correct management of all which, the person employed, and the committee, and the individuals of the ayuntamientos who appoint them, shall be individually responsible, and that this responsibility may be at all times effectual, the said appointments shall be made *viva voce*, and information shall be given thereof, immediately to the government.

ART. 24. The government will sell to Mexicans, and to them only, such lands as they may wish to purchase, taking care that there shall not be accumulated in the same hands more than eleven sitios; and under the condition, that the purchaser must cultivate what he acquires by this title within six years from its acquisition, under the penalty of losing them, the price of each sitio, subject to the foregoing condition, shall be one hundred dollars, if it be pasture land; one hundred and fifty dollars, if it be farming land without the facility of irrigation; and two hundred dollars if it can be irrigated.

**ART. 25.** Until six years after the publication of this law, the legislature of this state, cannot alter it as regards the acknowledgment, and price to be paid for land, or as regards the quantity and quality, to be distributed to the new settlers, or sold to Mexicans.

**ART. 26.** The new settlers, who within six years from the date of the possession, have not cultivated or occupied the lands granted them, according to its quality, shall be considered to have renounced them, and the respective political authority shall immediately proceed to take possession of them, and recall the titles.

**ART. 27.** The contractors and military, heretofore spoken of, and those who by purchase have acquired lands, can alienate them at any time, but the successor is obliged to cultivate them in the same time, that the original proprietor was bound to do; the other settlers can alienate theirs when they have totally cultivated them, and not before.

**ART. 28.** By testamentary will, made in conformity with the existing laws, or those which may govern in future, any new colonist, from the day of his settlement, may dispose of his land, although he may not have cultivated it, and if he dies intestate, his property shall be inherited by the person or persons entitled by the laws to it; the heirs being subject to the same obligation and condition imposed on the original grantee.

**ART. 29.** Lands acquired by virtue of this law, shall not by any title whatever, pass into mortmain.

**ART. 30.** The new settler who wishing to establish himself in a foreign country, resolves to leave the territory of the state, can do so freely, with all his property; but after leaving the state, he shall not any longer hold his land, and if he had not previously sold it, or the sale should not be in conformity with the 27th article, it shall become entirely vacant.

**ART. 31.** Foreigners who in conformity with this law, have obtained land, and established themselves in any new settlement, shall be considered from that moment, naturalised in the country; and by marrying a Mexican, they acquire a particular merit to obtain letters of citizenship of the state, subject however to the provisions which may be made relative to both particulars, in the constitution of the state.

**ART. 32.** During the first ten years, counting from the day on which the new settlements may have been established, they shall be free from all contributions, of whatever denomination, with the exception of those which, in case of invasion by any enemy, or to prevent it, are generally imposed, and all the produce of agriculture or industry of the new settlers, shall be free from excise duty *Alcabala*, or other duties, throughout every part of the state, with the exception of the duties referred to in the next article; after the termination of that time, the new settlements shall be on the same footing as to taxes, with the old ones, and the colonists shall also in this particular, be on the same footing with the other inhabitants of the state.

**ART. 33.** From the day of their settlement, the new colonists shall be at liberty to follow any branch of industry, and can also work

mines of every description, communicating with the supreme government of the confederation, relative to the general revenue appertaining to it, and subjecting themselves in all other particulars, to the ordinances or taxes, established or which may be established on this branch.

ART. 34. Towns shall be founded on the sites deemed most suitable, by the government, or the person commissioned for this effect, and for each one, there shall be designed four square leagues, whose area may be in a regular or irregular form, agreeably to the situation.

ART. 35. If any of the said sites should be the property of an individual, and the establishment of new towns on them, should notoriously be of general utility, they can, notwithstanding, be appropriated to this object, previously indemnifying the owner for its just value, to be determined by appraisers.

ART. 36. Building lots in the new towns shall be given gratis, to the contractors of them, and also to artists of every class, as many as are necessary for the establishment of their trade; and to the other settlers they shall be sold at public auction, after having been previously valued—under the obligation to pay the purchase money by instalments of one third each; the first in six months, the second in twelve months, and the third in eighteen months; but all owners of lots, including contractors and artists, shall annually pay one dollar for each lot, which, together with the produce of the sales, shall be collected by the ayuntamientos, and applied to the building of churches in said towns.

ART. 37. So far as practicable, the towns shall be composed of natives and foreigners, and in their delineations great care should be taken to lay off the streets straight, giving them a direction from north to south, and from east to west, when the site will permit it.

ART. 38. For the better location of the said new towns, their regular formation and exact partition of their lands and lots, the government on account of having admitted any project, and agreed with the contractor or contractors, who may have presented it, shall commission a person of intelligence and confidence, giving him such particular instructions as may be deemed necessary and expedient; and authorising him under his own responsibility, to appoint one or more surveyors to lay off the town scientifically, and do whatever else may be required.

ART. 39. The governor in conformity with the last fee bill *Arancel*, of notary publics of the ancient audience of Mexico, shall designate the fees of the commissioner, who, in conjunction with the colonists, shall fix the surveyor's fees: but both shall be paid by the colonists, and in the manner which all parties among themselves may agree upon.

ART. 40. As soon as at least forty families are united in one place, they shall proceed to the formal establishment of the new towns, and all of them shall take an oath to support the general and state constitutions; which oath will be administered by the commissioner, they

shall then, in his presence, proceed for the first time to the election of their municipal authority.

ART. 41. A new town, whose inhabitants shall not be less than two hundred, shall elect an ayuntamiento, provided there is not another one established within eight leagues, in which case, it shall be added to it. The number of individuals which are to compose the ayuntamiento, shall be regulated by the existing laws.

ART. 42. Foreigners are eligible, subject to the provisions which the constitution of the state may prescribe, to elect the members of their municipal authorities, and to be elected to the same.

ART. 43. The municipal expenses, and all others which may be considered necessary, or of common utility to the new towns, shall be proposed to the governor, by the ayuntamientos through the political chief, accompanied with a plan of the taxes *arbitrios*, which in their opinion may be just and best calculated to raise them, and should the proposed plan be approved by the governor, he shall order it to be executed, subject however to the resolution of the legislature, to whom it shall be immediately passed with his report and that of the political chief, who will say whatever occurs to him on the subject.

ART. 44. For the opening and improving of roads and other public works in Texas, the government will transmit to the chief of that department the individuals who, in other parts of the state, may have been sentenced to public works as vagrants, or for other crimes, these same persons may be employed by individuals for competent wages, and as soon as the time of their condemnation is expired, they can unite themselves as colonists to any new settlement, and obtain the corresponding lands, if their reformation shall have made them worthy of such favor in the opinion of the chief of the department, without whose certificate they shall not be admitted.

ART. 45. The government in accord with the respective ordinary ecclesiastics, will take care to provide the new settlements with the competent number of pastors, and, in accord with the same authority, shall propose to the legislature for its approbation, the salary which the said pastors are to receive, which shall be paid by the new settlers.

ART. 46. The new settlers as regards the introduction of slaves, shall subject themselves to the existing laws, and those which may hereafter be established on the subject.

ART. 47. The petitions now pending relative to the subject of this law, shall be despatched in conformity with it, and for this purpose, they shall be passed to the governor, and the families who may be established within the limits of the state, without having any land assigned them, shall subject themselves to this law, and to the orders of the supreme government of the Union, with respect to those who are within twenty leagues of the limits of the United States of America, and ten leagues in a straight line of the coast of the Gulf of Mexico.

ART. 48. This law shall be published in all the villages of the state, and that it may arrive at the notice of all others throughout the



Mexican confederation, it shall be communicated to their respective legislatures, by the secretary of this state; and the governor will take particular care to send a certified copy of it, in compliance with the 161st article of the federal constitution, to the two houses of congress, and the supreme executive power of the nation, with a request to the latter to give it general circulation through foreign states, by means of your ambassadors.

The governor pro tem. of the state will cause it to be published and circulated.—Saltillo, 24th March, 1825.—Signed,

RAFAEL RAMOS Y VALDEZ, *President.*

JUAN VICENTE GAMPOS, *Member and Sec'y.*

JOSE JOAQUIN ARCE ROSALES, *Member and Sec'y.*

Therefore, I command all authorities, as well civil as military and ecclesiastical, to obey, and cause to be obeyed, the present decree in all its parts.

RAFAEL GONZALES, *Governor.*

[No. 22.] *Contract with the Government of the State for the Colonisation of five hundred Families.*

*Executive Department of the State of Coahuila and Texas.*

I have before me the representation, directed by you to the supreme government of the nation, dated 6th November, 1824, soliciting that Galveston might be made a port of entry, and asking authority to settle two or three hundred families, more or less, on the lands contiguous to those already distributed in that colony, and particularly on the bay of Galveston, and the rivers that discharge into it; you also ask authority to found a town, on the island of Galveston, or at some suitable point; which representation was transmitted to me by the honorable legislature of the state, when it communicated to me the law of colonisation, passed by that body the 24th of March last, for the purposes which might be necessary, relative to said new colony proposed by you.

Subsequently, I received your representation of the 4th of February last, on the same subject, and proposing to colonise three hundred honest and industrious families, a part of whom were in the country on the Trinity, and Neches rivers, beyond your limits; which families you offer to settle on the waters of the Brazos and Colorado, as high as to the San Antonio road.

In consequence of your representations, and keeping in view the contracts, made by this government a few days since, with four other empresarios, to colonise all the lands adjacent to your colony on the east, north and west, with two thousand four hundred families; in conformity with the law of colonisation, and the conditions imposed by the government, excepting only, the ten border leagues on the coast, and twenty border leagues on the boundary line, reserved by the national colonisation law, of the 18th August, 1824, subject to the

disposition of the national government; and being informed that there remains much vacant land within the limits of your first colony, not granted to any person; I hereby grant the permission which you petition for, to settle the three hundred families you mention, on the the vacant lands, remaining in the colony now under your charge, and not comprehended in any of those already granted to other empresarios, so as to avoid granting an establishment on lands already assigned to others for that purpose.

In case you still wish to effect the colonisation of the said three hundred families, which you propose, within the limits of your first colony, the said additional families must subject themselves to the federal constitution, and that of the state, and to the general and local laws of their adopted country; the said new colony shall also be regulated by the colonisation law of the state of the 24th March last, and you as empresario, must be subject to the following stipulations:

**ART. 1.** The government admits the proposition presented by citizen Stephen F. Austin, in his representation of the 4th February, of the last year, relative to the colonisation of three hundred families, so far as may be conformable with the colonisation law, passed by the honorable legislature of this state, 24th March last; and I hereby designate, in compliance with the 8th article of said law, and in consequence of your representation, the vacant land within the limits of the colony which you have already established, excepting only the ten border leagues on the coast, which can only be colonised with the previous approbation of the supreme executive power of the nation, in conformity with the law of the 18th August, 1824.

**ART. 2.** You shall respect the possessions given to individuals, who occupy the lands within your limits, under legal titles.

**ART. 3.** In conformity with the said colonisation law of the 24th March, the empresario, citizen Stephen F. Austin, shall introduce the three hundred families which he proposes, within the term of six years, counting from the day on which the said empresario signs this contract, under the penalty of losing the rights and privileges granted to him by the 8th article of said law.

**ART. 4.** The families that are to compose this colony, besides being industrious as offered in the representation, must also be catholics, and of good moral habits, which qualifications must be proved by the documents, required in the 5th article of the colonisation law, of the 24th March.

**ART. 5.** It shall be an obligation upon him, not to admit criminals, vagabonds, or men of bad conduct, and he shall cause all those of this description, who are found within his limits to leave it, and should it be necessary, he shall put them out by force of arms.

**ART. 6.** For this purpose the colonists shall be formed into a body of national militia, of which he shall be the chief, until otherwise directed.

**ART. 7.** So soon as he shall have introduced at least one hundred families, he shall notify the government thereof, in order that a com-

missioner may be sent with competent instructions to put new colonists in possession of their lands, and to establish the new towns agreeably to law.

ART. 8. The official communications with the government, and with the authorities of the state, instruments, and other public acts, must be written in the Spanish language, and when new towns are formed he shall promote the establishment of schools in the Spanish language, in such towns.

ART. 9. It shall also be his duty to promote the building of churches in said towns, and the providing of them with ornaments, sacred vases and other furniture, destined for divine worship, and to solicit in due time the necessary number of priests for the administration of spiritual affairs.

ART. 10. In all other particulars not expressed in the above stipulations, he shall subject himself to the colonisation law, and other general laws.

ART. 11. The foregoing are the conditions or stipulations on which this government admits the new project of colonisation, proposed by you in your aforementioned official representation, and should they be accepted by you, you will so declare under your signature at the end of this instrument, which you will then return to me, to be filed in the archives of this government, and a certified copy thereof, and of your official representation attested by the secretary of state, shall be immediately transmitted to you for your security in order that you may immediately proceed with said project. God and Liberty. Saltillo, 27th of April, 1825.

RAFAEL GONZALES, *Governor of the State.*

To Citizen STEPHEN F. AUSTIN.

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Having seen the stipulations and conditions, stated in the foregoing official instrument of his excellency, Rafael Gonzales, governor of the state of Coahuila and Texas, relative to the colonisation of three hundred foreign families on the vacant lands remaining within the colony which I have already established in Texas; I hereby declare my acceptance of the same, and agree to comply with them in every particular under the penalty of losing the rights and privileges mentioned in the third article of said stipulations. San Felipe de Austin, 4th of June, 1825.

STEPHEN F. AUSTIN.

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[No. 23.] *Official letter of the Governor extending the foregoing Contract to five hundred families.*

*Executive Department of the state of Coahuila and Texas.*

On the 27th of April last, I transmitted to you the conditions on which the government admitted the project of colonising three hundred families, proposed by you to the government of the Union in your representation of the 6th of November, 1824, and in that to the

government of this state, of the 4th of February last, specifying more particularly the section you wish to colonise.

I have just received the new representation which you have transmitted, under the date of the 4th of April last, proposing to establish five hundred families in said new colony; and understanding that the district designated for you in my communication of the 27th of April last, is sufficiently extensive to settle the five hundred families which you now propose, I hereby grant you permission to do so on the same conditions which I have before indicated to you, it being understood that your former petitions on this subject are all consolidated in the last ones of the 4th of April.

As regards establishing the port of Galveston I will communicate the result to you separately as soon as the sovereign congress of the nation determines that question. God and Liberty. Saltillo, 20th of May, 1825.

RAFAEL GONZALES, *Governor of the State.*

To Citizen STEPHEN F. AUSTIN.

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[No. 24.] *Limits of the above mentioned Colony.*

*Executive Department of the state of Coahuila and Texas.*

Taking into consideration the representation of citizen Stephen F. Austin, an empresario of the department of Texas, for the colonisation of five hundred families on unappropriated lands of the state, asking a specific demarcation of limits within which the said families are to be settled; in order to avoid at all times any kind of doubts, or disputes between adjoining empresarios, or the respective colonists, situated near the same limits, and keeping in view the concessions granted by this government to the empresarios Green De Wit, Robert Leftwich, and John Lucius Woodbury, which are situated on the west, north and east of the colony, of said citizen, Stephen F. Austin; I have thought proper to add as an additional article to the contract on colonisation, concluded the 4th of June, 1825, the following permanent demarcation of limits for the before mentioned colony.

Commencing on the west bank of the river San Jacinto, at the termination of the ten league reserve, from the gulf of Mexico and thence following up the right bank of said river to its head, thence due north, to the road leading from Bexar to Nacogdoches; thence following said road westwardly, to a point from whence a line due south will strike the La Baca to within ten leagues of the Gulf of Mexico, and thence eastwardly along the said ten league line parallel with the coast, to the place of beginning.

This order and the petition of said Austin on the subject, shall be added to the documents relative to said colony of five hundred families, and it shall also be communicated to said empresario, and all others who may be interested, for their information.

And I communicate it to you, and under this date have also com-

municated it to the commissioners of that colony, for the corresponding effects. God and Liberty. Saltillo, 7th March, 1827.

ARISPE, *Governor of the State.*

To Citizen STEPHEN F. AUSTIN.

JUAN ANTONIO PADILLA,  
*Secretary of State.*

[No. 25.] (*Commission of Gaspar Flores, for the second colony.*)

*Executive Department, of the State of Coahuila and Texas.*

Convinced of your honor, integrity, and other necessary qualifications, I have thought it proper to appoint you commissioner for the partition of lands, to the new colonists, in the contract of colonisation, of citizen Stephen F. Austin, with the government of this state; which I communicate to you, for your information, with the understanding that I will transmit to you the instructions, and other documents, by which you are to be governed in the discharge of this most important commission.—God and Liberty.—Saltillo, 21st April, 1826.

ARISPE.

To citizen GASPÉ FLORES.

JUAN ANTONIO PADILLA,  
*Secretary of State.*

[No. 27.] *Contract with the Government for settling the reserve land on the coast, between La Baca and San Jacinto.*

Petition of S. F. Austin, to the President.—The land situated within the ten border leagues from the Gulf of Mexico on the Brazos and Colorado rivers is in part colonised by me, under the concession granted by the supreme government of the Mexican nation, thus leaving a portion of vacant land within said ten leagues; and as it is of great importance to the prosperity of this new colonial establishment, that said ten leagues should be added to the colony, which the government of the state of Coahuila and Texas has assigned to me, for the settlement of the five hundred families which I have contracted to introduce; I therefore petition the national government to grant me permission to colonise the ten border leagues on the coast, within the following limits—to wit, beginning on the east side of the La Baca, ten leagues from the coast, thence eastwardly following the northern boundary of the ten border leagues, to the river San Jacinto; thence down the same to the coast, thence following the latter westwardly to the mouth of said La Baca, and up said river to the place of beginning; comprehending all the vacant lands between the said rivers La Baca and San Jacinto, and within the ten border leagues from the coast; and that said section of country should be added to the before-mentioned colony, to be colonised under the same conditions stipulated with the government of the state of Coahuila and Texas, for said colony of five hundred families.

STEPHEN F. AUSTIN.

*Sun Felipe de Austin, 5th June, 1826.*

*Opinion of the Governor of the State on the foregoing petition.*

Most Excellent Sir:—I have the honor to transmit to your excellency the original petition of citizen Stephen F. Austin, empresario of the colony of this name, on the Brazos and Colorado rivers in Texas; soliciting permission to colonise the ten border leagues on the Gulf of Mexico, between La Baca and San Jacinto.

Having completed the colony of three hundred families, which the said Austin contracted with the supreme government of the nation in April 1823, he solicited, in 1825, authority from the state government to introduce five hundred families more, and settle them in the section of country designated for his first colony, and a contract was entered into with him, for that purpose, on the terms and conditions expressed in the copy of said contract; which I herewith have the honor of transmitting to your excellency for the better elucidation of this subject.

This government in forwarding the above mentioned petition to your excellency, in compliance with the 7th article of the colonisation law of this state of the 24th March, 1825, has the satisfaction of informing your excellency, that it can discover no objections whatever to the approval of said petition by the supreme government of the nation, but on the contrary it is of opinion that great benefits will result from said establishment; and that commerce, in the products of the new colonists, will flourish in consequence of the settlement of those lands, and the opening of the ports of the Brazos, Colorado, and La Baca.

As regards the merits of the said empresario, I can assure your excellency, that besides being the first who introduced the first families in Texas, when the country was an entire wilderness, and being a citizen of this nation, by a special letter of citizenship, he has proved by his conduct and adhesion to the established government, that he merits the highest confidence. God and liberty. Saltillo, 17th July, 1826.

VICTOR BLANCO,  
JUAN ANTONIO PADILLA,  
*Secretary of State.*

To his Excellency, the Minister of }  
Interior and Exterior Relations. }

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*Approbation of the President.*

Most Excellent Sir:—Having rendered an account to his excellency, the president, of the petition of citizen Stephen F. Austin, empresario of the colony of this name, on the Brazos and Colorado Rivers of Texas, asking permission to colonise ten border leagues on the Gulf of Mexico, between the La Baca and San Jacinto; the president has thought proper, in conformity with your opinion of the 17th July, 1826, which accompanied said petition, to approve of the concession of the lands which the interested person has petitioned for, under the

condition of subjecting himself, in all things relative to said new colony, to the law on the subject of the 18th August, 1824.

Which I communicate to your excellency by order of the president, for the corresponding effects. God and liberty. Mexico, 22d April, 1828.

CANEDO.

To his Excellency the Governor of the State of Coahuila and Texas.

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*Representation of S. F. Austin to the Governor of the State.*

Citizen Stephen F. Austin, with due respect, represents that his excellency the president of the United Mexican States, having granted me permission to colonise the ten border leagues on the coast, between La Baca and San Jacinto, as appears by the official letter of the minister of relations dated 22d April last; and as I am ready to commence the enterprise so soon as I receive the competent authority from the government of the state of Coahuila and Texas; I therefore solicit your excellency to authorise me, in conformity with the law on the subject, to colonise the land comprehended within the before mentioned limits, and to survey and divide out said lands, to the colonists, in the portions prescribed by law, and to issue to them their titles of possession and property, in the name of the government of this state, giving to me the term of six years to complete said enterprise, the colonists paying the expenses of the surveying, titles, and possessions, according to the provisions of the law; I also ask authority to select and take for my own proper use, benefit and property, the quantity of five leagues and five labors, which I am entitled to as empresario agreeably to law, for each one hundred colonists, which I establish within said limits, governing myself in all things by the general law of colonisation of 18th August, 1824, and the state law of the 24th March, 1825; and for my security I petition that your excellency will be pleased to transmit to me an attested copy in due form, of the said official letter of his excellency, the minister of relations, of 22d April last, and of this petition, and of the authority which your excellency may think proper to give me on this subject. Town of Austin, 2d June, 1828.

STEPHEN F. AUSTIN.

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*Contract between the Government of the state and Austin; and appointment of the latter as commissioner.*

In the city of Leona Vicario (*Saltillo*) this ninth day of July 1828, His Excellency the governor of the State of Coahuila and Texas, having examined the foregoing petition of citizen Stephen F. Austin, and the accompanying documents relative to the colonisation of the border lands, situated on the coast of the Gulf of Mexico, from the La Baca to the San Jacinto, and taking into consideration the merits

and qualifications of said citizen Stephen F. Austin, has thought proper to declare on said petition and documents, the resolution contained in the following articles and conditions.

ART. 1. In virtue of the approbation of the supreme government of the nation, dated 22d April, of the present year, which forms a part of the documents in this matter; the government of this state admits the project of colonisation, presented by said empresario, so far as it is conformable to the general law of the 18th August, 1824, and the law of the state, of the 24th March, 1825, both of them on the subject of colonisation, and I hereby designate in compliance with the 8th article of the said state law, the territory which he solicits, under the following boundaries: beginning at the mouth of the La Baca on its left bank, thence following along the coast of the Gulf of Mexico to the point where the San Jacinto river discharges into Galveston bay; thence following up the left bank of the San Jacinto river ten leagues in a straight line, thence westwardly parallel with the coast to a point on the La Baca, ten leagues in a straight line above its mouth, thence following down the left bank of said La Baca to its mouth, at the place of beginning.

ART. 2. All possessions under legal titles which may be found within the territory, designated in the preceding article, shall be respected by the new colonists, and the said empresario is hereby charged with the fulfilment of this duty.

ART. 3. At any time, in case the government should need any tracts of land which, from their local situation, may be useful, beneficial, and proper, for the construction of any forts, wharves, or public warehouses, for the defence of any ports, or establishments of the public administration, the empresario shall not have any right to impede the occupation of any such lands or useful points which may be selected by officers appointed by the government, and which may be necessary for any objects of public security or integrity of the territory, although they may not be comprehended in those specified in this article.

ART. 4. Citizen Stephen F. Austin, having the confidence of the government, is hereby authorised in due form to discharge, at the same time, both the obligations of empresario, and the duties and functions of commissioner of the government, in the establishment of new towns and settlements in the before-mentioned border lands, which are the subject of this contract, and to cause said lands to be surveyed and divided out to the colonists, with entire conformity to the law, on the subject and to the instructions of the government, which will be separately directed to him.

ART. 5. Inasmuch as the said empresario has not clearly expressed the number of families which he offers to introduce on said border territory, which he is now permitted to colonise; it is necessary that he should make a specific declaration to the government as to this particular, or whether he has another contract of five hundred families pending, to be established in the interior of the country, it is his



wish to locate a part of them in said border territory, as appears to be indicated by his representation of 5th June, 1826, whatever said Stephen F. Austin may determine on this point shall be considered as inserted in this article.

ART. 6. The said empresario shall have the right to receive the lands designated in the 12th article of the colonisation law of this state in proportion to the number of families he is to introduce, and to select said land at the sites or situation which he may choose, the titles of possession for said lands in favor of the said empresario shall be delivered by the first alcalde of the town of San Felipe de Austin, who is hereby commissioned in due form for the sole purpose.

ART. 7. The other duties and obligations of citizen Stephen F. Austin, as empresario, are those of a general nature, which, although not expressed in this contract, are inserted in his contract for five hundred families, extended by this government the 27th of April, 1825, all of which shall be considered as herein inserted.

ART. 8. His duties and obligations as commissioner of the government for this enterprise, are those prescribed by the law of colonisation of this state, of the 24th March, 1825, and by the instructions to the commissioner approved by the legislature the 4th of September, 1827, and by which all his operations shall be governed under the responsibilities therein specified.

ART. 9. The certified copy in due form, solicited by said citizen Stephen F. Austin, of the documents on this subject, and of this contract, shall be delivered to him attested by the secretary of state, in order that, should this contract be accepted of by him, said Austin, it shall be considered as concluded and perfected from the date of his acceptance thereof, from which date the term of six years shall be computed, prescribed by law for the introduction of the families under this colonisation enterprise.

ART. 10. The salary or fees corresponding to the commissioner, shall be regulated by the provisions of the law of the legislature of the state, No. 62, dated 15th of May of the present year.—Date as above.

J. MARIA VIESCA.

JUAN ANTONIO PADILLA, *Sec'y of State.*

Citizen Juan Antonio Padilla, secretary of the state of Coahuila and Texas. I certify that the foregoing is literally and legally copied from the originals, which are on file in this office under my charge.

JUAN ANTONIO PADILLA,

*Secretary of State.*

*Leona. Vicario, 12th July, 1828.*

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*Acceptance of the foregoing Contract by S. F. Austin.*

Having examined the contract which his excellency the governor of the state of Coahuila and Texas has thought proper to comprise

in ten articles, dated in the city of Leona Vicario, 9th July, 1828, for the colonisation of the ten border leagues on the coast of the Gulf of Mexico, between the La Baca and San Jacinto, in Texas; I, citizen Stephen F. Austin, declare that I accept of the said contract, under its stipulations; and as respects the fifth article of the same, which requires a declaration on my part of the number of families which I engage to introduce, in virtue of said contract, I hereby declare and offer to introduce the number of three hundred; it being understood that I am to receive the premium land, in proportion to the families which I introduce, designated for empresarios, in the 12th article of the colonisation law of the state, although they should not amount to three hundred, if they exceed one hundred as provided in said 12th article; and being regulated by the maximum, established in the same article of said law, and by the contracts entered into with the government, by me on the 27th April, 1825, and the 20th November, 1827.—God and Liberty.—Town of Austin, 20th July, 1828.

STEPHEN F. AUSTIN.

To his excellency the governor of the state of Coahuila and Texas.

*Executive Decree on the above Acceptation.*

*Leona Vicario, 21st August, 1828.*

The above acceptation is added to the documents, and a copy of it, and of this decree, shall be transmitted to the empresario for his security.

VIESCA.

JUAN ANTONIO PADILLA, *Sec'y of State.*

A copy from the original, filed with the respective documents in this office under my charge.—Leona Vicario, 22d August, 1828.

JUAN ANTONIO PADILLA, *Sec'y of State.*

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*Instructions to the Commissioner appointed by the Legislature of the State.*

*Executive Department of the State of Coahuila and Texas.*

Instructions by which the commissioner shall be governed in the partition of lands to the new colonists, who may establish themselves in the state, in conformity with the colonisation law of the 24th March, 1825.

ART. 1. It shall be the duty of the commissioner, keeping in view the contract which an empresario may have entered into with the government, and also the colonisation law of the 24th March, scrupulously to examine the certificates or recommendations which foreign emigrants must produce from the local authorities of the place where they removed from, accrediting their christianity, morality, and steady habits, in conformity with the 5th article of said law, without which requisite they shall not be admitted in the colony.

ART. 2. In order to prevent being imposed on by false recommendations, the commissioner shall not consider any as sufficient without a previous opinion in writing as to their legitimacy, from the empresario, for which purpose they shall be passed to him by the commissioner.

ART. 3. The commissioner shall administer to each of the new colonists the oath in form, to observe the federal constitution of the United Mexican states, the constitution of the state, the general laws of the nation, and those of the state which they have adopted for their country.

ART. 4. He shall issue in the name of the state the titles for land, in conformity with the law, and put the new colonists in possession of their lands, with all legal formalities, and the previous citation of adjoining proprietors, should there be any.

ART. 5. He shall not give possession to any colonists who may have established, or who may wish to establish themselves within twenty leagues of the limits of the United States of the north, or within ten leagues of the coast, unless it should appear that the supreme government of the nation had approved thereof.

ART. 6. He shall take care that no vacant lands be left between possessions, and in order that the lines may be clearly designated, he shall compel the colonists, within the term of one year, to mark their lines, and to establish fixed and permanent corners.

ART. 7. He shall appoint, under his own responsibility, the surveyor, who must survey the land scientifically, requiring him previously to take an oath truly and faithfully to discharge the duties of his office.

ART. 8. He shall form a manuscript book of paper of the 3d stamp, in which shall be written the titles of the lands distributed to the colonists, specifying the names, the boundaries, and other requisites, and legal circumstances; and a certified copy of each title shall be taken from said book on paper of the 2d stamp, which shall be delivered to the interested person on his title.

ART. 9. Each settler shall pay the value of the stamp paper used in issuing his title both for the original and copy.

ART. 10. This book shall be preserved in the archives of the new colony, and an exact form of it shall be transmitted to the government, specifying the number of colonists, with their names, and the quantity of land granted to each one, distinguishing that which is farming land with or without the facilities of irrigation, and that which is granted as grazing land.

ART. 11. He shall select the site which may be the most suitable for the establishment of the town or towns, which are to be founded agreeably to the number of families composing the colony, and keeping in view the provisions of the law of colonisation on this subject.

ART. 12. After selecting the site destined for the new town, he shall take care that the base lines run north and south, east and west; and he will designate a public square one hundred and twenty varas

on each side, exclusive of the streets, which shall be called the *principal, or constitutional square*, and this shall be the central point from which the streets shall run, for the formation of squares and blocks in conformity with the model hereto annexed.

ART. 13. The block situated on the east side of the principal square shall be destined for the church, curate's house, and other ecclesiastical buildings. The block on the west side of said square shall be designated for public buildings of the municipality. In some other suitable situation a block shall be designated for a market square, another for a jail and house of correction, another for a school and other edifices for public instruction, and another beyond the limits of the town for a burial ground.

ART. 14. He shall, on his responsibility, cause the streets to be laid off straight, and that they are twenty varas wide, to promote the health of the town.

ART. 15. Mechanics, who at the time of founding a new town, present themselves to settle in it, shall have the right of receiving one lot a piece without any other cost than the necessary stamp paper for issuing the title, and the light tax of one dollar annually for the construction of the church.

ART. 16. The lots spoken of in the preceding article shall be distributed by lot, with the exception of the empresario, who shall be entitled to any two lots he may select.

ART. 17. The other lots shall be valued by appraisers according to their situation, and sold to the other colonists at their appraised value. In case there should be a number of applicants for the same lot, owing to its situation or other circumstances, which may excite competition, it shall be decided by lot as prescribed in the preceding article; the product of said lots shall be appropriated to the building of a church in said town.

ART. 18. He shall, in union with the empresario, promote the settlement of each town by the inhabitants belonging to its jurisdiction, who take lots in it, and cause them to construct houses on said lots within a limited time under the penalty of forfeiting them.

ART. 19. He shall form a manuscript book of each new town, in which shall be written the titles of the lots which are given as a donation, or sold, specifying their boundaries and other necessary circumstances, a certified copy of each one of which on the corresponding stamp shall be delivered to the interested person as his title.

ART. 20. He shall form a topographical plan of each town that may be founded, and transmit it to the government, keeping a copy of it in the said register book of the colony.

ART. 21. He shall see that at the crossing of each of the rivers on the public roads, where a town is founded, a ferry is established at the cost of the inhabitants of said town, a moderate rate of ferriage is established to pay the salary of the ferryman and the cost of the necessary boats, and the balance shall be applied to the public funds of the town.

ART. 22. In places where there is no towns, and where ferries are necessary, the colonists who may be settled there shall be charged with the establishment of the ferry, collecting a moderate ferriage until such ferries are rented out for the use of the state. Any colonist who wishes to establish a ferry on the terms above indicated, shall form an exact and certified account of the costs which he may be at for the building of boats, and also an account of the produce of the ferry, in order that when said ferry is rented out for the use of the state, he shall have a right to receive the amount of said expenses which had not already been covered by the produce of the ferry, which for the present he will collect.

ART. 23. He shall preside at the popular elections mentioned in the 40th article of the colonisation law for the appointment of the ayuntamiento, and shall put the elected in possession of their offices.

ART. 24. He shall take special care that the portions of land granted to the colonists by articles 14, 15, and 16, shall be measured by the surveyors with accuracy, and not permit any one to include more land than is designated by law, under penalty of being personally responsible.

ART. 25. Should any colonist solicit, in conformity with the 17th article of the law, an augmentation of land beyond that designated in the preceding articles, on account of the size of the family, industry, or capital, he shall present his petition in writing to the commissioner, stating all the reasons on which he founds his petition, who shall transmit it to the governor of the state, together with his opinion, for which opinion he shall be responsible in the most rigid manner, in order that the governor may decide on the subject.

ART. 26. All the public instruments, titles, or other documents issued by the commissioner, shall be written in Spanish, the memorials, decrees, and reports of the colonists or empresarios, on any subject whatever, shall be written in the same language, whether they are to be transmitted to the government, or preserved in the archives of the colony.

ART. 27. All public instruments or titles of possession, and the copies signed by the commissioner, shall be attested by two assistant witnesses.

ART. 28. The commissioner shall be personally responsible for all acts or measures performed by him contrary to the colonisation law, or these instructions.

A copy.—Saltillo, September 4th, 1827.

TIJERINA, } *Secretaries of the*  
ARCINIEGA, } *Legislature.*

A copy, JUAN ANTONIO PADILLA.  
*Secretary of State.*

## BOOK VI.

### FRENCH ORDINANCES.

#### TITLE I.

##### RÉVOCATION DES CONCESSIONS NON DÉFRICHÉES.

LE Roi s'étant fait représenter en son Conseil son Edit du present mois, par lequel sa Majesté en conséquence de la concession et démission des intéressés en la Compagnie de la *Nouvelle France*, auroit repris tous les droits qui lui avoient été accordés par le Roi deffunt, en conséquence du traité du vingt neuf Avril Mil six cent vingt sept, et ayant été remontré à sa Majesté que l'une des principales causes que le dit pays ne s'est pas peuplé comme il auroit été à désirer, et même que plusieurs habitations ont été détruites par les Iroquois. provient des Concessions de grande quantité de terres qui ont été accordées à tous les particuliers habitans du dit pays, qui n'ayant jamais été et n'étant pas en pouvoir de défricher, et ayant établi leur demeure dans le milieu des dites terres, ils se sont par ce moyen trouvés fort éloignés les uns des autres et hors d'état de se secourier et s'assister et même d'être secourus par les officiers et soldats des garnisons de *Québec* et autres places du dit pays, et même il se trouve par ce moyen que dans une fort grande étendue de pays, le peu de terres qui se trouvent aux environs des demeures des donataires se trouvant défrichées, le reste est hors d'état de le pouvoir jamais être. A quoi étant nécessaire de pourvoir, sa Majesté étant en son Conseil a ordonné et ordonne que dans six mois du jour de la publication du présent Arrêt, dans le dit pays tous les particuliers ainsi habitants d'icelui feront défricher les terres contenues en leurs concessions, sinon et à faute de ce faire, le dit temps passé, ordonne sa Majesté, que toutes les terres non en friche, seront distribuées par nouvelles concessions au nom de sa Majesté, soit aux anciens habitans d'icelui, soit aux nouveaux. Révoquant et annullant sa dite Majesté toutes concessions des dites terres non encore défrichées par ceux de la dite Compagnie; Mande et ordonne sa dite Majesté aux Sieurs *De Mézy*, Gouverneur, Evêque de *Pétrée*, et *Robert*, Intendant au dit pays, de tenir la main à l'exécution ponctuelle du présent Arrêt; même de faire la distribution des dites terres non défrichées, et d'en accorder des Concessions au nom de sa dite Majesté. Fait au Conseil d'Etat, le Roi y étant, le vingt et unième jour de Mars, mil six cent soixante et trois. Signé, de *Lomerie*, *Mézy*, *François* Evêque de *Pétrée*, *Rouer*, *Villeray*, *Juchereau de Laferté*, *Ruelle*, *Duuteuil*, *D'amour*, *Bourdon*.

## TITLE II.

ARRET DU CONSEIL D'ETAT DU ROI, POUR L'ÉTABLISSEMENT DE LA COMPAGNIE  
DES INDES OCCIDENTALES.

LOUIS, par la Grace de Dieu, Roi de France et de Navarre, à tous presents à venir, Salut. La paix dont jouit présentement cet Etat, nous ayant donné lieu de nous appliquer au rétablissement du commerce, nous avons reconnu que celui des colonies et de la Navigation sont les seuls et véritables moyens de le mettre dans l'état où il est chez les étrangers, pour à quoi parvenir et exciter nos sujets à former puissante Compagnie, nous leur avons promis de si grands avantages, qu'il y a lieu d'espérer que tous ceux qui prendront quelque part à la gloire de l'état et qui voudront acquérir du bien par les voies honorables et légitimes, y entreront très volontiers, ce que nous avons reconnu avec beaucoup de joie par la Compagnie qui s'est formée depuis quelques mois pour la terre ferme de l'*Amérique*, autrement appelée *France* équinoctiale; mais comme il ne suffit pas à cette compagnie de se mettre en possession des terres que nous leur accordons et les faire défricher et cultiver par les gens qui y envoient avec grands frais, si elles ne se mettent en état d'y établir le commerce, par le moyen duquel les François qui s'habitueront au dit pays communiqueront avec les naturels habitants en leur donnant, en échange des denrées qui croissent dans leur pays, les choses dont ils ont besoin. Il est aussi absolument nécessaire pour faire ce commerce d'équiper nombre de vaisseaux pour porter journellement les dites marchandises qui se débitent au dit pays et rapporter en *France* celles qui s'en retirent, ce qui n'a point été fait jusqu'à présent par la Compagnie ci-devant formée ayant reconnu que le pays de *Canada* a été abandonné par les intéressés en la Compagnie qui s'y étoit formée en mil six cent vingt huit, faute d'y envoyer annuellement quelque léger secours, ce que dans les Isles de l'*Amérique* où la facilité des terres y a attiré un grand nombre de François, ceux de la Compagnie à laquelle nous les avons concédés en l'année mil six cent quarante-deux, au lieu de s'appliquer à l'agrandissement de cette Colonie et d'établir dans cette grande étendue de pays un commerce qui leur du être très-avantageux, se sont contentés de vendre les dites Isles à divers particuliers, lesquels s'étant seulement appliqués à cultiver les terres, n'ont subsisté depuis ce tems-là que par les secours des étrangers, en sorte que jusques à présent ils ont seuls profité du courage des François qui ont les premiers découvert et habité les dites Isles et du travail de plusieurs milliers de personnes qui ont cultivé les dites terres. C'est pour ces considérations que nous avons repris des intéressés en la dite Compagnie de *Canada* la concession qui leur avoit été accordée du dit

pays par le feu Roi notre très honoré Seigneur et pere de glorieuse mémoire, laquelle ils nous ont volontairement cédée par acte en leur assemblée du vingt-quatrième Février, mil six cent soixante et trois et que nous avons résolu de retirer les dites Isles de l'*Amérique* qui ont été vendues aux dits particuliers par la dite Compagnie en remboursant les propriétaires d'icelles du prix de leurs acquisitions et des améliorations qu'ils y auront faites: mais comme notre intention a été de retirer les dites Isles, et les remettre entre les mains d'une Compagnie qui put les posséder toutes, achever de les peupler et y faire le commerce que les étrangers y font présentement, nous avons estimé en même tems qu'il étoit de notre gloire et de la grandeur et avantage de l'état de former une puissante Compagnie pour faire tout le commerce des Indes occidentales, à laquelle nous voulons concéder toutes les dites Isles, celles de *Cayenne* et de toute la terre ferme de l'*Amérique*, depuis la rivière des *Amazones* jusqu'à celle d'*Orignoc*; le *Canada*, l'*Acadie*, Isle de *Terreneuve* et autres Isles et terre ferme, depuis le Nord du dit Pays du *Canada* jusqu'à la *Virginie* et *Floride*, ensemble toute la côte de l'*Afrique* depuis le Cap *Vert* jusqu'au Cap de *Bonne-espérance*, soit que les dits pays nous appartiennent pour être ou avoir été ci-devant habités par les François, soit que la dite Compagnie s'y établisse, en chassant ou soumettant les sauvages ou naturels du pays ou les autres nations de l'Europe qui ne sont dans notre alliance, afin que la dite Compagnie ayant établi de puissantes Colonies dans le dit Pays, elle les puisse régir et gouverner par ce même esprit, et y établir un commerce considerable tant avec les François qui y sont jà habitués et ceux qui s'y habitueront après, qu'avec Indiens et autres naturels habitants des dits pays dont elle pourra tirer de grands avantages, pour cet effet nous avons jugé à propos de nous servir de la dite Compagnie de la terre ferme de l'*Amérique*; laquelle Compagnie étant déjà composée de beaucoup d'intéressés et munie de beaucoup de vaisseaux, peut aisément se mettre en état de former celle des Indes Occidentales et se fortifiant de tous ceux de nos sujets qui voudront y entrer, soutenir cette grande et louable entreprise. A CES CAUSES et autres bonnes considérations à ce nous mouvans, savoir faisons, qu'après avoir fait mettre cette affaire en délibération en notre Conseil où étoient la Reine notre très honorée Danie et Mère, notre très cher frère le duc d'*Orléans*, plusieurs Princes et autres Grands de notre dit Conseil, de notre certaine science, pleine puissance et autorité Royale, Nous avons par le présent Edit, établi et établissons une Compagnie des Indes Occidentales, qui sera composée des intéressés en la terre ferme de l'*Amérique* et autres nos sujets qui voudront y entrer, pour faire tout le commerce qui se pourra faire en l'étendue des dits pays de la terre ferme de l'*Amérique*, depuis la Rivière des *Amazones* jusqu'à celle d'*Orenoc*, et Isles apellées *Antilles*, possédées par les François et dans le *Canada*, l'*Acadie*, Isles et terre ferme, et autres Isles et terres fermes depuis le nord du dit Pays de *Canada*, jusqu'à la *Virginie* et *Floride*; en-



semble la côte de l'*Afrique* depuis le Cap Vert jusqu'au Cap de *Bonne-Espérance*, tant et si avant qu'elle pourra s'étendre dans les terres soit que les dits pays nous appartiennent pour être ou avoir été ci-devant habités par les François, soit que la dite Compagnie s'y établisse en chassant ou soumettant les Sauvages ou naturels habitans du dit Pays ou les autres nations de l'*Europe*, qui ne sont dans notre alliance, lesquels pays nous avons concédés et concédons à la dite Compagnie en toute Seigneurie, propriété et justice; et après avoir examiné les articles et conditions qui nous ont été présentés par les intéressés de la dite Compagnie, nous les avons agréés et accordés, agréons et accordons ainsi qu'elles sont insérées ci-après:

I. Comme nous regardons dans l'établissement des dites Colonies principalement la gloire de Dieu en procurant le salut des Indiens et Sauvages, auxquels nous désirons faire connoître la vraie Religion, la dite Compagnie présentement établie sous le nom de *Compagnie des Indes Occidentales*, sera obligée de faire passer aux pays ci dessus concédés le nombre d'Ecclésiastiques nécessaire pour y prêcher le Saint Evangile et instruire ces peuples de la créance de la Religion Catholique, Apostolique et Romaine, comme aussi de bâtir des Eglises et y établir des Cures et Presbitères, dont elle aura la nomination, pour faire le service Divin aux jours et heures ordinaires et administrer les Sacremens aux habitans, lesquelles Eglises, Cures et Presbitères, la dite Compagnie sera tenue d'entretenir décemment et avec honneur, en attendant qu'elle les puisse fonder raisonnablement, sans toute fois que la dite Compagnie puisse changer aucun des dits Ecclesiastiques qui sont à present établis dans le dit pays, sur lesquels elle aura néanmoins le même pouvoir et autorité que les mêmes gouverneurs et propriétaires des dites Isles.

II. Que la dite Compagnie sera composée de tous ceux de nos sujets qui voudront y entrer de quelle qualité et condition qu'ils soient, sans que pour cela ils dérogent à leur noblesse et privilège, dont nous les dispensons, dans laquelle Compagnie pourront pareillement entrer les étrangers et sujets de quelque Prince et Etat que ce soit.

III. Tous ceux qui voudront entrer en la dite Société, soit François ou étrangers, y seront reçus pendant quatre mois, à compter du premier jour de Juin de la présente année, pour telle somme qui leur plaira, qui ne pourra néanmoins être moindre de trois mille livres, après lequel tems passé aucune personne n'y sera admise.

IV. Ceux qui mettront dans la dite Compagnie depuis dix jusqu'à vingt mille livres, soit François ou étrangers, pourront assister aux assemblées générales, et y avoir voix délibérative; et ceux qui mettront vingt mille livres et audessus pourront être élus Directeurs généraux chacun à leur tour, ou selon l'ordre qui sera arrêté par la dite Compagnie; et acquerront ceux qui seront intéressés en la dite Compagnie pour vingt mille livres, le droit de Bourgeoisie dans les villes du Royaume où ils feront leur résidence.

V. Les étrangers, qui entreront en la dite Compagnie pour la dite

somme de vingt mille livres, seront réputés François et regnicoles pendant le tems qu'ils demeureront et seront intéressés pour les dites vingt mille livres en la dite Compagnie, et après le tems de vingt années expiré, ils jouiront du privilège incommutablement, sans autre besoin d'autres lettres de naturalité; et tous parents, quoique étrangers, leur pourront succéder en tous les biens qu'ils auront en ce Royaume; leur déclarons que nous renonçons dès à present pour cet égard à tous droits d'aubaine.

VI. Les Officiers qui entrèrent en la dite Compagnie pour vingt mille livres seront dispensés de la résidence à laquelle Sa Majesté les oblige par la déclaration du mois de Décembre dernier, et jouiront de leurs gages et droits comme s'ils étoient présents au lieu de leur résidence.

VII. Les intéressés en la dite Compagnie pourront vendre, céder et transporter les actions qu'ils auront en icelle, à qui et ainsi que bon leur semblera.

VIII. Sera établie en la ville de *Paris* une chambre de Direction générale, composée de neuf Directeurs généraux, qui seront élus par la Compagnie, et dont il y en aura du moins trois de Marchands, lesquels Directeurs exerceront la dite direction pendant trois années, et où les affaires de la dite Compagnie requeroient des chambres de direction particulieres dans les Provinces, il en sera établi par la dite Compagnie, avec le nombre de Directeurs qu'elle jugera à propos, lesquels seront pris du nombre des marchands des dites Provinces, et non d'autres; lesquels dits marchands pourront être dans les dites directions particulieres, bien qu'ils ne soient intéressés que pour dix mille livres, et ne pourront les dits Directeurs généraux et particuliers être inquiétés en leurs personnes ni en leurs biens pour raison des affaires de la dite Compagnie.

IX. Sera tenue tous les ans une assemblée générale, le premier jour de Juillet, pour délibérer sur les affaires générales de la Compagnie, où tous ceux qui auront voix délibérative pourront assister; en laquelle assemblée, seront nommés les dits Directeurs généraux et particuliers, à la pluralité des voix; et comme la dite Compagnie ne peut être entièrement formée avant le premier jour d'Octobre prochain, sera le quinziesme du dit mois fait une assemblée générale pour la nomination des neuf premiers Directeurs généraux, dont trois sortiront après trois années expirées, et à leur place il en entrera trois nouveaux, la même chose se fera l'année suivante et ainsi toutes les années il en entrera et sortira pareil nombre, en sorte que la dite Chambre de direction générale sera toujours composée de neuf Directeurs, savoir, six anciens et trois nouveaux, qui exerceront trois années à la reserve des neuf premiers Directeurs, dont trois exerceront quatre années et les dits trois autres cinq, afin que les affaires de la dite Compagnie soient conduites avec plus de connoissance; la même chose se pratiquera pour l'élection des Directeurs particuliers; et en cas de mort d'aucun des Directeurs, il en sera élu d'autres par la dite Compagnie au dit jour premier de Juillet.

X. Les Secrétaire et Caissier général de la Compagnie en la *Nouvelle France* seront nommés par icelle à la pluralité des voix, et ne pourront être destitués qu'en la même maniere.

XI. Les effets de la dite Compagnie, ni les parts et portions qui appartiendront aux intéressés en icelle, ne pourront être saisis pour nos affaires, pour quelque cause, prétexte ou occasion que ce soit, ni même les parts qui appartiendront aux étrangers, pour raison ou sous prétexte de guerre, représaille ou autrement, que nous pourrions avoir contre les Princes et Etats dont ils sont sujets.

XII. Ne pourront pareillement être saisis les effets de la dite Compagnie par les créanciers d'aucun des intéressés, pour raison de leurs dettes particulieres, et ne seront tenus les Directeurs de la dite Société de faire voir l'état des dits effets, ni rendre aucun compte aux créanciers des dits intéressés, sauf aux dits créanciers à faire saisir et arrêter entre les mains du Caissier général de la dite Compagnie, ce qui pourra revenir aux dits intéressés par les comptes qui seront arrêtés par la Compagnie, auxquels ils seront tenus de se rapporter; à la charge que les dits saisissants feront vendre les dites saisies dans les six mois du jour qu'elles auront été faites, après lesquels elles seront nulles et comme non avenues, et la dite Compagnie pleinement déchargée.

XIII. Les Directeurs généraux de *Paris*, nommeront les officiers commandants, et commis nécessaires pour le service de la dite compagnie, soit dans le Royaume ou dans les pays concédés; et ordonneront des achats des marchandises, équipements de vaisseaux, payements de gages et officiers et commis, et généralement de toutes les choses qui seront pour le bien et utilité de la dite Compagnie; lesquels Directeurs pourront agir les uns en l'absence des autres, à la charge toutefois que les ordonnances pour les dépenses seront signées au moins par quatre des Directeurs.

XIV. Les comptes des Chambres de direction particuliere ou des Commissionnaires qui seront établis dans les Provinces seront rendus à la Chambre de direction générale à *Paris*, de six mois en six mois; et ceux de la dite Chambre de direction générale de *Paris*, arrêtés d'année en année; et les profits partagés, à la réserve des deux premières années, pendant lesquelles il ne sera fait aucun partage; lesquels comptes seront rendus à la maniere des marchands; et les livres de raison de la dite Compagnie, tant de la dite Direction générale que des particulieres, seront tenus en parties doubles, auxquels livres sera ajouté foi et justice.

XV. La Compagnie fera seule, à l'exclusion de tous nos autres sujets, qui n'entreront en icelle, tout le commerce et navigation dans les dits pays concédés pendant quarante années; et à cet effet nous faisons défense à tous nos dits sujets, qui ne seront de la dite Compagnie, d'y négocier à peine de confiscation de leurs vaisseaux et marchandises, applicables au profit de la dite Compagnie, à la reserve de la pêche qui sera libre à tous nos dits sujets.

XVI. Et pour donner moyen à la dite Compagnie de soutenir les grandes dépenses qu'elle sera obligée de faire pour l'entretien des Colonies et du grand nombre de vaisseaux qu'elle enverra aux dits pays concédés: Nous promettons à la dite Compagnie de lui faire payer pour chacun voyage de ses dits vaisseaux, qui feront leurs équipements et cargaisons dans les ports de *France*, iront décharger et rechargeront dans les dites Isles et terre ferme où les colonies Françaises seront établies, et feront leur retour dans les ports du Royaume, trente livres pour chacun tonneau de marchandises qu'ils porteront dans les dits pays, et quarante livres pour celles qu'ils en rapporteront et déchargeront, ainsi qu'il est dit, dans les ports du Royaume; dont, à quelque somme que chaque voyage se puisse monter, nous lui avons fait et faisons don, sans que pour ce il soit besoin d'autres lettres que la présente concession: Voulons et ordonnons que les dites sommes soient payées à la dite Compagnie par le Garde de notre Trésor Royal sur les certifications de deux des Directeurs, et passées dans ses comptes sans aucune difficulté.

XVII. Les marchandises qui auront été déclarées pour être consommées dans le Royaume, et acquittées des droits d'entrée et que la Compagnie voudra renvoyer aux pays étrangers, ne payeront aucuns droits de sortie, non plus que les sucres qui auront été raffinés en *France*, dans les raffineries que la Compagnie fera établir, lesquels nous déchargeons pareillement de tous droits de sortie, pourvu qu'ils soient chargés sur des vaisseaux François pour être transportés hors du Royaume.

XVIII. La dite Compagnie sera pareillement exempte de tous droits d'entrée et sortie sur les munitions de guerre, vivres et autres choses nécessaires pour l'avitaillement et armement des vaisseaux qu'elle équipera, même de tous les bois, cordages, goudron, canons de fer et de fonte et autres choses qu'elle fera venir des pays étrangers, pour la construction des navires qu'elle fera bâtir en *France*.

XIX. Appartiendront à la dite Compagnie, en toute Seigneurie, propriété et justice, toutes les terres qu'elle pourra conquérir et habiter pendant les dites quarante années en l'étendue des dits pays ci-devant exprimés et concédés, comme aussi les Isles de l'*Amérique* appelées *Antilles*, habitées par les François, qui ont été vendues à plusieurs particuliers par la Compagnie des dites Isles formée en 1642, en remboursant les Seigneurs propriétaires d'icelles des sommes qu'ils ont payées pour l'achat, conformément à leur contrat d'acquisition, et des améliorations et augmentations qu'ils y ont faites suivant la liquidation que les Commissaires par nous à ce députés, et les laissant jouir des habitations qu'ils y ont établies depuis l'acquisition des dites Isles.

XX. Tous lesquels pays, isles et terres, places et forts, qui peuvent, y avoir été construits et établis par nos sujets, Nous avons donné, octroyé et concédé, donnons, octroyons et concédons à la dite Compagnie pour en jouir à perpétuité en toute propriété, seigneurie et justice;

ne nous réservant autre droit, ni devoir que la seule Foi et Hommage-lige, que la dite Compagnie sera tenue de nous rendre et à nos successeurs Rois, à chaque mutation de Roi avec une Couronne d'or du poids de trente marcs.

XXI. Ne sera tenue la dite Compagnie d'aucun remboursement ni dédommagement envers les compagnies auxquelles nous ou nos prédécesseurs Rois ont concédé les dites terres et isles, nous chargeant d'y satisfaire si aucun leur est dû, auquel effet nous avons révoqué et révoquons à leur égard toutes les concessions que nous leur en avons accordées; auxquelles, en tems que besoin, nous avons subrogé la dite Compagnie pour jouir de tout le contenu en icelle, ainsi et comme si elles étoient particulièrement exprimées.

XXII. Jouira la dite Compagnie en qualité de Seigneur des dites terres et isles, des droits Seigneuxiaux qui y sont présentement établis sur les habitants des dites terres et isles, ainsi qu'ils se lèvent à présent par les Seigneurs propriétaires, si ce n'est que la Compagnie trouve à propos de les commuer en autres droits pour le soulagement des dits habitants.

XXIII. La dite Compagnie pourra vendre ou inféoder les terres, soit dans les dites isles et terres fermes de l'*Amérique*, ou ailleurs dans les dits pays concédés, à tels cens, rentes et droits Seigneuxiaux qu'elle jugera bon, et à telles personnes qu'elle trouvera à propos.

XXIV. Jouira la dite Compagnie de toutes les mines et minieres, caps, golfes, ports, havres, fleuves, rivières, isles et islots, étant dans l'étendue des dits pays concédés, sans être tenue de nous payer pour raison des dites mines et minieres aucuns droits de Souveraineté, desquels nous lui avons fait don.

XXV. Pourra la dite Compagnie faire construire des forts en tous les lieux qu'elle jugera nécessaires, pour la défense du dit pays, faire fonder canons à nos armes, audessous desquelles elle pourra faire mettre celles que nous lui accordons ci-après. Faire poudre, fonder, boulets, forger armes, et lever gens de guerre dans le Royaume, pour envoyer au dit pays, en prenant notre permission en la forme ordinaire et accoutumée.

XXVI. La dite Compagnie pourra aussi établir tels Gouverneurs qu'elle jugera à propos, soit dans la terre ferme, par Provinces ou départements séparés, soit dans les dites Isles, lesquels Gouverneurs nous seront nommés et présentés par les Directeurs de la dite Compagnie pour leur être expédié nos provisions; et pourra la dite Compagnie les destituer toutes fois et quantes que bon lui semblera, et en établir d'autres en leur place, auxquels nous feront pareillement expédier nos lettres sans aucune difficulté, en attendant l'expédition desquelles, ils pourront commander le tems de six mois ou un an au plus sur les commissions des directeurs.

XXVII. Pourra la dite Compagnie armer et équiper en guerre tel nombre de vaisseaux qu'elle jugera à propos, pour la défense des dits Pays et sûreté du dit Commerce, sur lesquels vaisseaux elle pourra

mettre tel nombre de canons de fonte que bon lui semblera, arborer le Pavillon blanc avec les armes de *France*, et établir tels Capitaines, Officers, Soldats et Matelots qu'elle trouvera bon, sans que les dits vaisseaux puissent être par nous employés, soit, à l'occasion de quelque guerre ou autrement, sans le consentement de la dite Compagnie.

XXVIII. S'il est fait aucune prise par les vaisseaux de la dite Compagnie sur les ennemis de l'état dans les mers des Pays concédés, elles lui appartiendront et seront jugées par les Officiers qui seront établis dans le lieu des dits Pays où elles pourront être menées plus commodément, suivant les Ordonnances de la Marine, nous réservant sur icelles le droit de l'Amiral, lequel donnera sans difficulté les commissions et congés pour la sortie des dits vaisseaux des ports de *France*.

XXIX. Pourra la dite Compagnie traiter de paix et alliance en notre nom avec les Rois et Princes des Pays où elle voudra faire ses habitations de Commerce, et convenir avec eux des conditions et des traités, qui seront par nous approuvés; et en cas d'insulte, leur déclarer la guerre, les attaquer et se défendre par la voie des armes.

XXX. Et en cas que la dite Compagnie fut troublée en la possession des dites terres et dans le Commerce par les ennemis de notre état, nous promettons de la défendre et assister de nos armes et de nos vaisseaux à nos frais et dépens.

XXXI. Pourra la dite Compagnie comme Seigneurs haut-justiciers de tout les dit pays, établir des Juges et Officiers partout où besoin sera et où elle trouvera à propos, de les déposer et destituer, quand bon lui semblera, lesquels connoîtront de toutes affaires de justice, police, commerce et navigation tant civiles que criminelles; et où il sera besoin d'établir des Conseils souverains, les Officiers dont ils seront composés, nous seront nommés et présentés par les Directeurs généraux de la dite Compagnie; et sur les dites nominations les provisions seront expédiées.

XXXII. Pourra la dite Compagnie prendre pour ses armes un Ecusson en champ d'Azur, semé de fleurs de lys d'or sans nombre, deux Sauvages pour support et une Couronne trefflée; lesquelles armes lui concédons pour s'en servir dans ses sceaux et cachets, et que nous lui permettons de mettre et apposer aux édifices publics, vaisseaux, canons et partout ailleurs où elle jugera à propos.

XXXIII. Seront les Juges établis en tous les dits lieux, tenus de juger suivant les Loix et Ordonnances du Royaume, et les Officiers de suivre et se conformer à la coutume de la prévôté et vicomté de *Paris*, suivant laquelle les habitants pourront contracter sans que l'on y puisse introduire aucune autre coutume pour éviter la diversité.

XXXIV. Et pour favoriser d'autant plus les habitants des dits pays concédés, et porter nos sujets à s'y habituer, nous voulons que ceux qui passeront dans les dits pays, jouissent des mêmes libertés et franchises que s'ils étoient demeurant en ce Royaume, et que ceux qui naîtront d'eux, et des sauvages convertis à la foi Catholique, Apostolique et Romaine soient censés et réputés regnicoles et naturels

François, et comme tels, capables de toutes successions, dons, legs et autres dispositions, sans être obligés d'obtenir aucunes lettres de naturalité, et que les artisans qui auront exercé leur art et métier au dit Pays pendant dix années consécutives, en rapportant certificats des Officiers des lieux où ils auront demeuré, attestés des Gouverneurs, et certifiés par les directeurs de la dite Compagnie, soient réputés maîtres de chefs d'œuvres en toutes les villes de notre Royaume où ils voudront s'établir sans aucune exception.

XXXV. Permettons à la dite Compagnie de dresser et arrêter tels Statuts et Réglements que bon lui semblera pour la conduite, et direction de ses affaires, tant en *Europe* que dans les dits Pays concédés; lesquels Statuts et Réglements nous confirmerons par lettres patentes, afin que les intéressés de la dite Compagnie soient obligés de les observer selon leur forme et teneur, sous les peines portées par iceux, que les contrevenants subiront comme arrêt de cour souveraine.

XXXVI. Tous différends entre les Directeurs et intéressés en la dite Compagnie ou intéressés d'associés, avec autres associés, pour raison des affaires d'icelle, seront jugés à l'amiable, par trois autres Directeurs dont sera convenu, et où les parties n'en voudroient convenir il en sera nommé d'Office, sur le champ, par les autres Directeurs, pour juger l'affaire dans le mois; et où les dits arbitres ne rendroient leur jugement dans le dit tems; il en sera nommé d'autres, afin d'arrêter par ce moyen la suite des procès et divisions qui pourroient arriver en la dite Compagnie, auquel jugement les parties seront tenues d'acquiescer comme si c'étoit arrêt de Cour souveraine, à peine contre les contrevenants de perte de leur capital qui tournera au profit de l'acquiescant.

XXXVII. Et au regard des procès et difficultés qui pourroient naître entre les Directeurs de la dite Compagnie et les particuliers non intéressés pour raison des affaires d'icelle, seront jugés et terminés par les Juges consuls dont les sentences et jugemens s'exécuteront souverainement jusqu'à la somme de mille livres, et audessus de la dite somme par provision, sauf l'appel pardevant les Juges qui en devront connoître.

XXXVIII. Et quant aux matieres criminelles dans lesquelles aucun de la dite Compagnie sera partie, soit en demandant, ou défendant, elles seront jugées par les Juges ordinaires, sans que pour quelque cause que ce soit, le criminel puisse attirer le civil, lequel sera jugé comme il est dit ci-dessus.

XXXIX. Ne sera par nous accordé aucunes lettres d'Etat, ni de répit, évocation ou sur séance à ceux qui auront acheté des effets de la Compagnie, lesquels seront contrainits au payement de ce qu'ils devront par les voies et ainsi qu'ils y seront obligés.

XL. Après les dites quarante années expirées, s'il n'est jugé à propos de continuer le privilège du commerce, toutes les terres et Isles que la Compagnie aura conquises, habitées ou fait habiter, avec les droits et dus Seigneuriaux et redevances qui seront dus par les dits habitants, lui demeureront à toute perpétuité en toute propriété, Seigneurie et justice, pour en faire et disposer ainsi que bon loi sem-

blera, comme de son propre héritage, comme aussi des forts, armes, et munitions, meubles, ustencils, vaisseaux et marchandises qu'elle aura dans le dit Pays, sans pouvoir y être troublée, ni que nous puissions retirer les dites terres et Isles pour quelque cause, occasion et prétexte que ce soit, à quoi nous avons renoncé dès à présent, à condition que la dite Compagnie ne pourra vendre les dites terres à aucuns étrangers sans notre permission expresse.

XLI. Et pour faire connoître à la dite Compagnie comme nous désirons la favoriser par tous moyens, et contribuer de nos deniers à son établissement et à l'achat des vaisseaux et marchandises dont elle a besoin pour envoyer au dit Pays; nous promettons de fournir le dixieme de tous les fonds qui seront faits par la dite Compagnie, et ce pendant quatre années, après lesquelles la dite Compagnie nous rendra la dite somme, sans aucuns intérêts; et en cas que pendant les dites quatre années elle souffre quelque perte, en la justifiant par les comptes, nous consentons qu'elle soit prise sur les deniers que nous aurons avancés; si mieux nous ne voulons laisser le dit dixieme ainsi par nous avancé dans la caisse de la dite Compagnie, encore pour autres quatre années, le tout sans aucun intérêt, pour être à la fin des dites huit années fait un compte général de tous les effets de la dite Compagnie; et en cas qu'il se trouve de la perte du fonds capital nous consentons que la dite perte soit prise sur le dixieme jusques à la concurrence d'icelui.

XLII. En attendant que la dite Compagnie soit entièrement formée, ce qui ne peut être qu'après le tems accordé à toutes personnes d'y entrer, ceux qui y seront présentement intéressés, nommeront six d'entr'eux pour agir dans les affaires de la dite Compagnie et travailler incessamment à faire équiper les vaisseaux, et aux achats des marchandises qu'il convient d'envoyer dans le dit Pays; auxquels Directeurs ceux qui voudront entrer en la dite Compagnie, s'adresseront; et ce qui aura été géré et négocié par eux, sera approuvé.

XLIII. Toutes lesquelles condition ci-dessus exprimées nous promettons exécuter de notre part et faire exécuter partout où besoin sera et en faire jouir paisiblement la dite Compagnie sans que pendant le tems de la dite concession il puisse y être apporté aucune diminution, alteration ni changement.

Si donnons en mandament à nos amez et féaux Conseillers les gens tenans notre Cour de Parlement et Chambre des Comptes à *Paris*, que ces présentes ils fassent lire, publier et registrer, et le contenu en icelles, garder et observer selon sa forme et teneur, sans souffrir qu'il y soit contrevenu en aucune sorte et maniere que ce soit, car tel est notre plaisir. Et afin que ce soit chose ferme et stable à toujours, nous avons fait mettre notre scel à ces dites présentes, sauf en autre chose notre droit et l'autrui en toutes. Donné à *Paris* au mois de Mai, l'an de grâce mil six cent soixante et quatre, et de notre Règne le vingt deuxieme.

(Signé)

LOUIS.

Et plus bas par le Roi *De Lionne*, et à côté *visa Séguier*, et scellé du grand Scéau de cire verte en lacs de soie rouge et verte.



## TITLE III.

## ARRET DU CONSEIL D'ÉTAT DU ROI POUR RETRANCHER LA MOITIÉ DES CONCESSIONS.

LE Roi étant informé que tous ses sujets qui ont passé de l'ancienne en la *Nouvelle France* ont obtenu des concessions d'une très grande quantité de terres le long des Rivières du dit Pays, lesquelles ils n'ont pu défricher à cause de la trop grande étendue ce qui incommode les autres habitans du dit pays, et même empêche que d'autres François n'y passent pour s'y habituer, ce qui étant entièrement contraire aux instructions de sa Majesté pour le dit pays et à l'application qu'elle a bien voulu donner depuis huit ou dix années pour augmenter les colonies qui y sont établies, attendu qu'il ne se trouve qu'une partie des terres le long des Rivières cultivées, le reste ne l'étant point, et ne le pouvant être à cause de la trop grande étendue des dites concessions et de la foiblesse des propriétaires d'icelles. A quoi étant nécessaire de pourvoir, Sa Majesté étant en son Conseil, a ordonné et ordonne que par le Sieur *Talon*, Conseiller en ses Conseils, Intendant de la Justice, Police et finances au dit pays, il sera fait une déclaration précise et exacte de la qualité des terres concédées aux principaux habitans du dit pays, du nombre d'arpents ou autre mesure usitée du dit Pays qu'elles contiennent sur le bord des Rivières et au dedans des terres, du nombre de personnes et de bestiaux propres et employés à la culture et au défrichement d'icelles, en conséquence de laquelle déclaration la moitié des terres qui avoient été concédées auparavant les dix dernières années sera retranchée des concessions et donnée aux particuliers qui se présenteront pour les cultiver et défricher. Ordonne Sa Majesté que les ordonnances qui seront faites par le dit Sieur *Talon* seront exécutées selon leur forme et teneur, souverainement et en dernier ressort comme jugemens de cour supérieure, Sa Majesté lui attribuant pour cet effet toutes cours, juridictions et connoissance; Ordonnant en outre Sa Majesté que le dit Sieur *Talon* donnera les concessions des terres qui auront été ainsi retranchées à de nouveaux habitans, à condition toutefois qu'ils les défricheront entièrement dans les quatre premières années suivantes et consécutives, autrement et à faute de ce faire, et le dit tems passé, les dites concessions demeureront nulles. Enjoint Sa Majesté au Sieur Comte de *Frontenac*, Gouverneur et Lieutenant Général au dit pays, nos officiers du Conseil Souverain d'icelui de tenir la main, à l'exécution du présent arrêt, lequel sera exécuté nonobstant opposition et empêchement quelconque. Fait au Conseil d'Etat du Roi, la Reine y étant, tenu à St. Germain en Laye, le quatrième jour de Juin mil six cent soixante douze.

(Signé)

COLBERT.

*Mandement et Ordre du Roi sur l'Arrêt ci-dessus.*

Louis par la grâce de Dieu Roi de *France* et de *Navarre*: A notre amé et féal le Sieur de Comte *Frontenac*, Gouverneur et notre Lientenant Général en *Canada* et aux Officiers du Conseil souverain établi à *Québec*, SALUT. Par l'arrêt dont l'extrait est ci-attaché sous le contrescel de notre Chancelier de ce jourd'hui, donné en notre Conseil, d'Etat, nous avons ordonné que par le Sieur *Talon*, Conseiller en notre Conseil Intendant de justice, police et finances au dit Pays, il sera fait une déclaration précise et exacte de la quantité de terres concédées aux principaux habitants du dit pays, du nombre d'arpents ou mesure usitée qu'elles contiennent sur la bord des rivières et au dedans des terres du nombre des personnes et des bestiaux propres et employés à la culture et au défrichement d'icelles, en conséquence de laquelle déclaration la moitié des terres qui auront été concédées auparavant les dix dernières années seront retranchées des concessions et données aux nouveaux particuliers qui se présenteront pour les cultiver, et que les Ordonnances qui seront faites par le dit Sieur *Talon* seront exécutées selon leur forme et teneur souverainement et en dernier ressort, comme Cour supérieure; lui en attribuant à cette fin toute cour, juridiction et connoissance, et ordonnant en outre qu'il donnera des concessions des terres qui auront été ainsi retranchées à de nouveaux habitants, à condition toutefois qu'ils les défricheront entièrement dans les quatre premières années suivantes et consécutives, autrement et à faute de ce faire, et le dit temps passé, les dites concessions demeureront nulles: A CES CAUSES, Nous vous mandons et ordonnons par ces présentes de tenir la main à l'exécution du dit arrêt et à tout ce qui sera fait, réglé et ordonné par le dit Sieur *Talon* en conséquence, commandons au premier notre huissier ou sergent sur ce requis de faire pour son entière exécution tous actes et exploits nécessaires sans autre permission. Car tel est notre plaisir, donné à St. Germain en Laye, ce quatrième jour de Juin l'an de grâce mil six cent soixante douze, et de notre Règne le trentième.

(Signé)

MARIE THERESE.

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TITLE IV.

ARRET POUR RETRANCHER LES CONCESSIONS DE TROP GRANDE ÉTENDUE ET POUR FAIRE UN RECENSEMENT.

Le Roi ayant été informé que tous les sujets qui ont passé de l'ancienne en la *Nouvelle France*, ont obtenu des concessions d'une très grande quantité de terre le long des Rivières du dit Pays, lesquelles ils n'ont pu défricher à cause de la trop grande étendue, ce qui incommode les autres habitants du dit pays; et même empêche que d'autres

François n'y passent pour s'y habiteur, ce qui étant entierement contraire aux intentions de Sa Majesté pour le dit pays et à l'application qu'elle a bien voulu donner depuis huit ou dix années, pour augmenter les Colonies qui y sont établies, attendu qu'il ne se trouve qu'une partie desterrés le long des rivières cultivées, le reste ne l'étant point, et ne le pouvant être à cause de la trop grande étendue des dites concessions, et de la foiblesse des propriétaires d'icelles, à quoi étant nécessaire pourvoir, Sa Majesté en son Conseil, a ordonné et ordonne, que par le Sieur *Duchesneau*, Conseiller en son Conseil et Intendant de la Justice, Police et Finances au dit Pays, il sera fait une déclaration précise et exacte de la qualité des terres concédées aux principaux habitants du dit pays, du nombre d'arpens ou autres mesures usitées, du dit Pays, qu'elles contiennent sur le bord des rivières et au dedans des terres, du nombre de personnes et de bestiaux propres et employés à la culture et au défrichement d'icelles; en conséquence de laquelle déclaration la moitié des terres qui avoient été concédées auparavant les dix dernières années et qui ne se trouveront défrichées et cultivées en terres labourables ou en prés, sera retranchée des concessions et donnée aux particuliers qui se présenteront pour les cultiver et les défricher. Ordonne Sa Majesté que les ordonnances qui seront faites par le dit Sieur *Duchesneau* seront exécutées selon leur forme et teneur, souverainement et en dernier ressort, comme jugement de cour supérieure. Sa Majesté lui attribuant pour cet effet toute cour, juridiction et connoissance. Ordonne en outre Sa Majesté que le dit Sieur *Duchesneau* donne par provision les concessions des terres qui auront été ainsi retranchée, à de nouveaux habitants, à condition toutefois qu'ils les défricheront entièrement dans les quatre premières années suivantes et consécutives, autrement et à faute de ce faire, et le dit tems passe, les dites concessions demeureront nulles; Enjoint sa Majesté au Sieur Comte de *Frontenac*, Gouverneur et Lieutenant Général pour Sa Majesté au dit pays, et aux officiers du Conseil Souverain d'icelui, de tenir la main à l'exécution du présent Arrêt, lequel sera exécuté, nonobstant opposition et empêchements quelconques. Fait au Conseil d'Etat du Roi, tenu au camp de *Luttre* près *Namur*, le quatrième, Juin, mil six cent soixante et quinze.

(Signé)

COLBERT.

*Mandement du Roi sur l'Arrêt ci-dessus.*

Louis par la grace de Dieu, Roi de *France* et de *Navarre*: A notre amé et féal le Sieur, Comte de *Frontenac*, notre Gouverneur et Lieutenant Général, en la *Nouvelle France*, et à nos amés et féaux les Officiers du Conseil Souverain au dit pays, Salut. Ayant par l'Arrêt, dont l'extrait est ci-attaché, sous le contrescel de notre Chancellerie ce jourd'hui donné en notre Conseil d'Etat, nous y étant commis et député le Sieur *Duchesneau*, Conseiller en nos Conseils, Intendant de Justice, Police et Finances au dit pays aux fins d'icelui. Nous vous mandons et ordonnons par ces présentes, signées de notre main,

de tenir la main à l'exécution du dit Arrêt, lequel nous voulons être exécuté; commandons au premier huissier ou sergent, sur ce requis, de faire, pour son entière exécution, tous commandements, sommations et autres actes et exploits nécessaires, sans autre permission. Car tel est notre plaisir. Donné au Camp de *Luling* près *Nusmur*, le cinquième jour de Juin; l'an de grâce mil six cent soixante et quinze et de notre règne le vingt troisième.

(Signé)

LOUIS.

Et plus bas, par le Roi, *Colbert*. Et scellé du grand Sceau de cire jaune et contrescellé.

Résumé pour être exécuté suivant l'Arrêt de ce jour, à *Québec*, au Conseil, le vingt et unième Octobre, mil six cent soixante et quinze,

(Signé)

PEUVRET.

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## TITLE V.

### RETRANCHEMENT DES CONCESSIONS DE TROP GRANDE ÉTENDUE, ET ORDRE D'EN DISPOSER, OCTOBRE 1679.

Vu par le Roi étant en son Conseil, l'Arrêt rendu en icelui le quatrième Juin 1675, portant que par le Sieur *Duchesneau*, Conseiller en son Conseil, Intendant de la Justice, Police et Finances en *Canada*, il sera fait une Déclaration précise et exacte de la qualité des Terres concédées aux principaux habitants du pays, et du nombre d'Arpens ou autres mesures y usitées, qu'elles contiennent, en conséquence de laquelle Déclaration la moitié des Terres qui avoient été concédées auparavant les dix dernières années et qui ne se trouveront défrichées et cultivées en terre labourable ou en près sera retranchée des Concessions et donnée aux particuliers qui se présenteront pour les défricher et cultiver, la Déclaration faite en conséquence par le dit Sieur *Duchesneau*, contenant l'étendue de chacune Concession et le nombre d'arpents qui en est défriché et habité, par laquelle il paroît que ces Concessions sont d'une si grande étendue, que la plus grande partie est demeurée inutile aux propriétaires, faute d'hommes et de bestiaux pour les défricher et mettre en valeur: Et Sa Majesté considérant que les terres qui restent à concéder dans le dit Pays sont les moins commodes et plus difficiles à cultiver pour leur situation et éloignement des Rivières navigables, ensorte que ceux de ses Sujets qui passent au dit Pays perdent la pensée d'y demeurer et s'y établir par cette seule raison, ce qui est très préjudiciable au bien et à l'augmentation de cette Colonie, à quoi étant nécessaire de pourvoir, Sa Majesté étant en son Conseil a ordonné et ordonne que l'Arrêt rendu en icelui le quatre Juin 1675 sera exécuté selon sa forme et teneur, et en conséquence déclare le quart des terres concédées avant l'année mil six cent soixante cinq, qui ne sont pas encore défrichées et cultivées dès

à présent, retranché aux propriétaires et possesseurs d'icelles, Ordonne de plus Sa Majesté qu'à l'avenir il sera pris chacune année à commencer l'année prochaine mil six cent quatre-vingt, la vingtième partie des terres faisant partie des dites Concessions qui ne se trouveront défrichées, pour être distribués aux Sujets de Sa Majesté habitans du dit Pays qui sont en état de les cultiver, ou aux François qui passeront au dit Pays pour s'y habituer, Enjoint Sa Majesté au Sieur Comte de *Frontenac*, Gouverneur et Lieutenant Général et au dit Sieur *Duchesneau*, de tenir la main à l'exécution du présent Arrêt, et de procéder à la distribution et nouvelle Concession des dites terres, suivant le pouvoir à eux donné par Lettres Patentes du vingt Mai 1676. Fait au Conseil d'Etat du Roi, Sa Majesté y étant, tenu à *St. Germain en Laye*, le neuvième jour de Mai mil six cent soixante dixneuf.

(Signé)

COLBERT.

*Mandement du Roi pour l'exécution de l'Arrêt ci-dessus.*

Louis par la Grace de Dieu, Roi de *France* et de *Navarre*, A nos Amés et Féaux Conseillers, le Sieur Comte de *Frontenac*, Gouverneur et notre Lieutenant Général au Pays de *Canada*, et *Duchesneau* Intendant de Justice Police, et Finances au dit Pays, SALUT. Par l'Arrêt dont l'extrait est ci-attaché, sous le contre-scel de notre Chancellerie ce jourd'hui rendu en notre Conseil d'Etat, Nous y étant, Nous avons ordonné que celui du quatre Juin 1675 sera exécuté selon sa forme et teneur, et en conséquence déclaré le quart des terres concédées avant l'année mil six cent soixante cinq, qui ne sont pas encore défrichées et cultivées dès à présent, retranché aux propriétaires et possesseurs d'icelles, et qu'à l'avenir il sera pris chacune année, à commencer l'année prochaine mil six cent quatre-vingt, la vingtième partie des terres faisant partie des dites Concessions qui ne se trouveront défrichées, pour être distribuées à nos Sujets habitans du dit Pays, ou aux François qui passeront au dit Pays, pour s'y habituer. A CES CAUSES, Nous vous Mandons et Ordonnons de tenir chacun à votre égard la main à l'exécution du dit Arrêt et de procéder à la distribution et nouvelle Concession des dites terres, suivant le pouvoir à vous donné par nos Lettres Patentes du vingtième Mai 1676. Com-mandons aux premiers nos Huissiers ou Sergens sur ce requis de signifier le dit Arrêt à tous qu'il appartiendra, à ce qu'il n'en prétendent cause d'ignorance, et faire pour l'entière exécution d'icelui tous Com-mandemens, Sommations et autres Actes et exploits requis et nécessaires. Voulons qu'aux Copies du dit Arrêt et des présentes dûment collationnées par l'un de nos Amés et Féaux Conseillers et Secrétaires Foi soit ajoutée comme à l'original. Car tel est notre plaisir. Donné à *St. Germain en Laye*. le neuvième jour de Mai, l'an de Grace mil six cent soixante dixneuf, et de notre Règne la trente sixième.

(Signé)

Et plus bas par le Roi,

LOUIS.  
COLBERT.

Et scellées du grand Sceau en cire jaune, et contre-scellées.

Réregistrées suivant l'Arrêt de ce jour à Québec le dernier Octobre, mil six cent soixante dixneuf.

(Signé)

PEUVRENT.

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## TITLE VI.

ARRÊT QUI CONFIRME LES CONCESSIONS FAITES PAR MONSIEUR LE GOUVERNEUR ET MONSIEUR L'INTENDANT, DEPUIS LE 12 OCTOBRE, 1676, JUSQU'AU 5 SEPTEMBRE, 1679.

VU PAR le Roi étant en son Conseil, sur Lettres Patentes de Sa Majesté du vingt Mai, 1676, portant pouvoir au Sieur Comte de *Frontenac*, Gouverneur et Lieutenant Général pour sa Majesté en *Canada*, et au Sieur *Duchesneau*, Intendant de Justice, Police et Finances au dit Pays, de donner conjointement les Concessions des terres tant aux anciens habitants du dit Pays qu'à ceux qui s'y viendront habituer de nouveau, à condition que les Concessions leur seront représentées dans l'année de leur date pour être confirmées, et que les terres concédées seront défrichées et mises en valeur dans les six années du jour de leurs concessions à peine de nullité; les dites Lettres registrées au Conseil Souverain du *Canada* le dixneuf Octobre, 1676. Et l'Etat des Concessions faites par le dit Sieur Comte de *Frontenac* conjointement avec le dit Sieur *Duchesneau*, depuis le douzieme Octobre 1676, jusques et compris le cinquieme Septembre, 1679, des Fiefs, Terres, Isles et Rivières aux nommés *Pierre de Joybert*, Damoiselle de *Soulange* et de *Marson*, *Randin*, de la *Vallières*, de *Repentigny*, *Berthier*, Damoiselle *Marie Anne Juchereau*, veuve de Sieur de *la Combe*, de *Bécancourt*, *Murie Guillemette Robert* veuve du Sieur *Couillard*, Damoiselle *Couillard*, *Nicholas Rousselot* dit la *Pruisier*, *Noel Langlois*, *François Bellanger*, d'*Amours*, *Deschaufour*, *Crevier*, de *Vercheres*, *Bizarre*, *Romain Becquet*, de *Boyuinet*, *Jacques de la Lunde*, *Louis Jolliet*, *Nicholas Juchereau* de *St. Denys* pour *Joseph Juchereau* son fils, *Andre de Chaume*, *Antoine Caddé*, *Charles Marquis*, *Jean Levrard* et aux Supérieurs et Ecclésiastiques de *St. Sulpice de Paris*, et sa Majesté voulant confirmer les dites Concessions, afin d'en rendre la jouissance paisible et perpétuelle aux dénommés ci-dessus, leurs hoirs et ayants cause, ouï le rapport du Sieur *Colbert*, Conseiller ordinaire du Roi en son Conseil, a confirmé et confirme les Concessions faites aux dits de *Joybert*, *Randin*, de la *Vallière*, de *Repentigny*, *Berthier*, veuve la *Combe*, de *Becancourt*, veuve *Couillard*, *Geneveive Couillard*, *Rousselot*, *Langlois*, *Bellanger*, d'*Amours*, *Deschaufour*, *Crevier*, de *Vercheres*, *Bizare*, *Becquet*, de *Boyuinet*, *Lalande*, *Jolliet*, de *St. Denys* pour

*Joseph Juchereau* son fils, de *Chaume*, *Caddé*, *Marquis*, *Levrard* et Supérieurs et Ecclésiastiques du Séminaire de *Paris* par le dit Sieur Comte de *Frontenac*, conjointement avec le dit Sieur *Duchesneau*, ordonne qu'ils en jouiront leurs hoirs et ayant cause en la forme et maniere portées par les actes de Concessions, même le dit *Langlois*, ses hoirs et ayant cause, de la maison qu'il a fait bâtir, sans pouvoir être troublés en la possession et jouissance pour quelque cause et occasion que ce soit, à la charge de défricher et mettre les terres à eux concédées en valeur, dans six années, à compter du jour des dites Concessions, à peine de nullité d'icelles, et aussi à la charge de payer les redevances dont elles seront expédiées. Veut sa Majesté que le présent Arrêt avec les dites Concessions soient enrégistrés en son Conseil Souverain de la *Nouvelle France*, étant en la ville de *Québec*, pour y avoir recours en cas de besoin. Fait au Conseil d'Etat du Roi, sa Majesté y étant, tenu à *Fontainebleau*, le vingt-neuvieme Mai, mil six cent quatrevingt.

(Signé)

COLBERT.

*Mandement du Roi sur l'Arrêt ci-dessus.*

Lours par le grâce de Dieu, Roi de France et de Navarre: A nos amés et féaux Conseillers en nos Conseils, Gouverneur et notre Lieutenant Général en *Canada*, le Sieur de *Frontenac*, et le Sieur *Duchesneau*, Intendant de Justice, Police et Finances au dit Pays, et à nos amés et féaux Conseillers les gens tenant notre Conseil Souverain en la *Nouvelle France*, étant en notre Ville de *Québec*, Salut. Par l'Arrêt dont l'extrait est ci-attaché sous le contrescel de notre Chancellerie ce jourd'hui donné en notre Conseil d'Etat, nous y étant, nous avons confirmé les Concessions faites aux nommés de *Joybert*, *Randin*, de la *Vuliere*, de *Repentigny*, *Berthier*, veuve *La Combe*, de *Becancourt*, veuve *Couillard*, *Genevieve Couillard*, *Rousselot*, *Langlois*, *Bellenger*, d'*Amours*, *Deschaufour*, *Crevier*, de *Vercheres*, *Bizare*, *Becquet*, de *Boyuinet*. *Lalande*, *Jolliet* de *St. Denis*, pour *Joseph Juchereau* son fils, *Dechaume*, *Caddé* *Marquis*, *Levrard* et Supérieurs et Ecclésiastiques du Séminaire de *St. Sulpice* de *Paris*, par le Sieur Comte de *Frontenac* conjointement avec le dit Sieur *Duchesneau*; et en conséquence avons ordonné et ordonnons qu'ils en jouiront, leurs hoirs et ayans cause en la forme et maniere portées par les actes de Concession, même le dit *Langlois*, ses hoirs et ayans cause de la maison qu'il a fait bâtir, sans pouvoir être troublés en la possession et jouissance, à la charge de défricher et mettre les dites terres à eux concédées en valeur dans six années à compter du jour des dites concessions, à peine de nullité d'icelles, et à la charge aussi de payer les redevances dont elles seront chargées. Mandons à nos dits amés et féaux les gens tenant notre Conseil Souverain de la *Nouvelle France*, étant en la Ville de *Québec*, d'y faire enrégistrer le présent Arrêt pour l'exécution duquel nous commandons à l'un des Huissiers de notre dit Conseil de faire tous exploits et actes nécessaires sans demander autre permission. Car tel est notre plaisir. Donné

à Fontainebleau le vingt-neuvieme Mai, l'an de grâce mil six cent quatrevingt et de notre Règne le trente-huitieme.

(Signé)

LOUIS.

Et plus bas, par le Roi, COLBERT. Et scellé du grand Sceau en cire jaune et contrescellé.

Réregistré suivant l'Arrêt de ce jour, à Québec le vingtquatrième Octobre, mil six cent quatrevingt.

(Signé)

PEUVRET.

## TITLE VII.

LETTERS PATENT IN FORM OF A PROCLAMATION FOR THE ESTABLISHMENT OF A TRADING COMPANY BY THE STYLE OF "WESTERN COMPANY," PUBLISHED IN PARIS IN THE MONTH OF AUGUST, 1717.

LEWIS, by the grace of God, of France and Navarre King, to all to whom these our present letters shall come, GREETING:

From the time of our accession to the crown, we have been successfully engaged in establishing good order in our finances, and in reforming the abuses which long-protracted wars had caused in them; nor have we paid less attention to the restoration of the trade of our subjects which contributes to their prosperity as much as the good administration of our finances. But having taken cognisance of the state of our colonies situated in the northern parts of America, we have remained satisfied that they were so much the more in need of our protection. M. Anthony Crozat, to whom the late King, our most honored lord and great grandfather, had, by letters patent of the month of September, 1712, granted the privilege of exclusive trade in our government of Louisiana, having humbly prayed that we might allow him to resign it, which we did allow him by the order of our council of the 23d of the present month of August, and the contract made with Messrs. Aubert, Neret and Gayot, on the 10th of May, 1706, for the trade in beaver of Canada, expiring at the end of the present year; We have thought fit, for the good of our service and the advantage of both colonies, to establish a company capable of upholding their trade and of undertaking the different species of husbandry and plantations that may be established there: Wherefore, and for other reasons us thereto inducing, by and with the advice of our dearly-beloved uncle, the Duke of Orleans Regent, *Petit fils de France*, of our dearly-beloved cousin the Duke of Bourbon, of our dearly-beloved cousin the Prince of Conty, princes of our blood, of our dearly-beloved uncle the Duke of Maine, of our dearly-beloved uncle the Count of Toulouse, legitimated princes, and other peers of France, grandees and notable persons of our kingdom, and by our



certain knowledge and royal authority we have said, determined and ordained, do say, determine and ordain, it is our will and pleasure,

I. That there be formed, by virtue of these present letters, a trading company by the style of *Western Company*, in which it shall be allowed to all our subjects, of whatever rank and quality they may be, as well as to all other companies formed or to be formed, and to all bodies and corporations, to take an interest for such sum or sums as they may think fit, and they shall not, on account of the said engagements, be considered as having degraded their titles, quality or nobility; our intention being that they may enjoy the benefit expressed in our proclamations of the months of May and August, 1664, August, 1669, and December, 1701, which shall be executed according to their form and tenor.

II. We grant to the said company, for the space of twenty-five years, beginning from the day of the registration of these present letters, the exclusive right of trading in our province and government of Louisiana, and also the privilege of receiving, to the exclusion of all other persons, in our colony of Canada, from the 1st of January, 1718, until and including the last day of December, 1742, all the beaver, fat and dry, which the inhabitants of the said colony shall have traded for, whilst we shall regulate, according to the accounts which shall be sent over to us from the said country, the quantities of the different sorts of beaver, that the company shall be bound to receive each year from the said inhabitants of Canada, and the prices they shall be bound to pay for them.

III. We forbid all our other subjects any sort of trade, within the limits of the government of Louisiana, as long as the charter of the *Western Company* shall last, upon pain of forfeiture of goods and vessels; not intending, however, by the present prohibition, to put any restraint upon their trading within the said colony, either among themselves or with the savages.

IV. We forbid likewise all our subjects to buy any beaver within the limits of the government of Canada, with a view to import in our kingdom, upon pain of forfeiture of the said beaver to the company, as also the vessels on board of which it shall be laden. The beaver trade shall nevertheless remain free in the interior of the colony between the merchants and the inhabitants, who may continue to sell and buy beaver as they have done heretofore.

V. With a view to give the said *Western Company* the means of forming a firm establishment, and enable her to execute all the speculations she may undertake, we have given, granted and conceded, do give, grant and concede to her, by these present letters and for ever, all the lands, coasts, ports, havens and islands, which compose our province of Louisiana, in the same way and extent as we have granted them to M. Crozat, by our letters patent of 14th September, 1712, to enjoy the same in full property, seigniority and jurisdiction, keeping to ourselves no other rights or duties than the fealty and liege homage the said company shall be bound to pay to us and to

the kings our successors at every new reign, with a golden crown of the weight of thirty marks.

VI. The said company shall be free, in the said granted lands, to negotiate and make alliance in our name, with all the nations of the land, except those which are dependent on the other powers of Europe; she may agree with them on such conditions as she may think fit, to settle among them, and trade freely with them, and in case they insult her, she may declare war against them, attack them or defend herself by means of arms, and negotiate with them for peace or for a truce.

VII. The property of all mines the said company may open during the time her charter lasts, shall belong to her by length of possession, and she shall not be bound to pay us during the said time, for the said mines, any right of sovereignty, whereof we have made and do make her a free gift, by these present letters.

VIII. The said company shall be free to sell and give away the lands granted to her for whatever quit or ground rent she may think fit, and even to grant them in freehold, without jurisdiction or seignior; she shall not however be at liberty to dispossess such of our subjects as are already settled in the lands granted to her, of such lands as have been granted to them, or which without special grant they may have begun to clear and cultivate. It is our will that such among them as have no grants or letters of us, be bound to take grants of the company, so as to insure to them the property of the land they enjoy, which grants shall be delivered to them free of all expenses.

IX. The said company shall be at liberty to construct all such forts, castles and strongholds as she may find necessary for the defence of the lands we have granted to her, garrison them and raise soldiers in our kingdom, after having taken our commission in the usual and accustomed form.

X. The said company shall be at liberty to establish such governors, officers, majors and others as they may think fit, to command the troops, and the said governors and major-officers shall be presented to us by the directors of the company, in order that we may deliver to them our commissions; and the said company shall be at liberty to dismiss them as often as they shall think fit and put others in their place, to whom we shall likewise deliver our commissions without any difficulty; and in the mean while, the said officers may command, for the space of six months or a year at most, under the commissions of the directors; and the governors and major-officers shall be bound to take the oath of allegiance to us.

XI. We allow all our military officers who are at present in our government of Louisiana and who may wish to remain there, as also those who may wish to go there and serve as captains and subalterns, to serve under the company's commissions, without losing on that account the rank or degree they actually enjoy, either in our fleet or in our army, and it is our will that in consequence of the permission

thereto that we shall deliver to them, they may be considered and accounted as still in our service, and we shall take into consideration their service under the said company as if it had been rendered to ourselves.

XII. The said company shall likewise be free to fit out and arm for war as many ships as she may think fit, for the increase and security of her trade, and to place in them as many guns as she pleases, and to hoist the flag on the hindcastle and the bowsprit, but on no other mast; she shall also be at liberty to cast cannons and mark them with our arms, under which she shall put those we shall grant her hereafter.

XIII. The said company being lord of the manor in the lands granted to her, shall be at liberty to establish justices and officers wherever she may think fit, to depose and dismiss them as often as she pleases; the said justices to take cognisance of all suits of police and trade, civil and criminal; and also to establish wherever need may be sovereign councils, the members of which shall be named and presented to us by the directors general of the said company, and after the said nominations we shall deliver to them their commissions.

XIV. The judges of the admiralty which shall be established in the said province of Louisiana, shall perform the same functions, administer justice in the same form and take cognisance of the same suits as those who are established in our kingdom and other parts of our dominions, and they shall receive their commissions from us, after being named by the lord high admiral of France.

XV. The judges established in all the said places shall be bound to administer justice according to the laws and statutes of the kingdom, and more particularly according to the common law of the provosty and viscounty of Paris, which shall be followed in all the contracts the inhabitants shall pass, and no other law shall be allowed to be introduced, to avoid variety.

XVI. All law suits that may spring up in France between the company and the private people on account of transactions concerning her, shall be decided and determined by the judges of trade in Paris, the decrees of whom shall be executed without appeal for any sum not exceeding one hundred and fifty livres, and for higher sums they shall be executed provisionally with right of appeal to our court of parliament in Paris. And regarding criminal suits in which the company shall be a party, either as plaintiff or as defendant, they shall be determined by the ordinary judges, without allowing any encroachment of the criminal over the civil suit, which shall be determined as above.

XVII. We shall grant no letter or respite, supersedeas or certiorari, to any persons who shall buy goods of the company, and they shall be compelled to pay their debt by the means and in the way they have engaged to do it.

XVIII. We promise to protect and defend the said company, and

to employ the force of our arms, if it be necessary, in order to maintain her in the full freedom of her trade and navigation; as likewise to see that justice be done to her for all the injury or ill treatment she may suffer from any nation whatever.

XIX. In case any director, sea captain, officer, clerk or agent, while transacting business for the company, should be taken prisoner by the subjects of the princes or states with whom we may be at war we promise to get them released or exchanged.

XX. It shall not be allowed to the said company to make use, for her trade, of any other vessels but those belonging to her or to our subjects, fitted out in the ports of our kingdom, manned with French crews, and they shall be bound to return to our ports; neither shall it be allowed her to send the said vessels direct from the lands granted her, to the coast of Guinea, upon pain of forfeiture of the present privilege, and confiscation of the vessels and the goods laden therein.

XXI. We allow all vessels belonging to the said company, and those of our subjects, who shall have received permission of her or her directors, to chase and capture the vessels of our subjects who shall presume to trade in the lands granted to her, contrary to the tenor of the present letters; and the prizes shall be awarded according to the regulations we shall make in that respect.

XXII. All goods, merchandise, provisions and ammunition, laden on the company's vessels shall be considered as belonging to her, unless it appear by bills of lading, in due form, that they have been taken on board for freight, by the orders of the company, her directors or agents.

XXIII. It is our pleasure that such of our subjects as shall go over to the lands granted to the said company, enjoy the same liberties and immunities as if they had remained living in our kingdom, and that those who shall be born there of French inhabitants of the said lands, and even of foreign Europeans, professing the Roman Catholic religion, who may come to settle there, be considered and reputed as inhabitants of our kingdom, and as such capable of inheriting and receiving gifts, legacies and other advantages without being bound to take letters of free denization.

XXIV. And in order to favor such of our subjects as shall settle within the said lands, we have declared and declare them, as long as the charter of the company lasts, free of all duties, subsidies and taxes whatever, as well on their persons and those of their slaves as on their merchandise.

XXV. The goods and merchandise which the said company shall have shipped for the lands granted to her, and those of which she may stand in need for building, outfitting and victualling her vessels, shall be free of all duties, as well towards us as towards our towns, levied at present or that may be levied in the future, on importation or on exportation, and although they should go out of one of our farmed revenues to enter into another, or from one of our ports to be transferred to another where the outfitting takes place, provided,

however, the clerks and agents of the company do sign an engagement to bring back, within eighteen months, a certificate of delivery in the country to which they were bound, upon pain, in case they fail so to do, of paying four times the duty, reserving to ourselves the right of allowing them a longer term in such cases and circumstances as we shall think fit.

XXVI. We declare likewise the said company free of the duties of toll, crossing, passage and other taxes levied to our profit on the rivers Seine and Loire, on empty casks, rafters and other wood, vessels and other goods, belonging to the said company, provided they send back by the wagoners and barge-men certificates signed by two directors.

XXVII. In case the said company should be obliged for the advantage of her trade to draw from foreign countries goods to be imported in the lands granted to her, the said goods shall be free of all importation or exportation duties, provided they be deposited in our custom house, warehouses, or in those of the said company, of which the clerks of the general farmers of our revenues and those of the said company shall each have a key, until such time as the said goods shall be laden in the company's vessels; the said company being bound to sign an engagement to deliver within the space of eighteen months, from the date of the engagement, certificates of the unloading of the said goods in the lands granted to her, in default whereof she shall be bound to pay four times the value of the duty, reserving to ourselves the right, whenever the company shall be in need of drawing from the said foreign countries, goods of which the importation might be prohibited, to grant her special leave of importation, if we think fit, for any such goods contained in the list to be submitted to our approbation.

XXVIII. The goods imported by the said company for her account, from the lands granted to her in the ports of our kingdom, shall pay, during the first ten years of her charter, the half only of the duty which such goods coming from the French islands and colonies in America, must pay, according to our regulation of the month of April last past; and if the said company should import from the said lands granted to her, other sorts of goods than those that come from the French islands and colonies in America and are contained in our said regulations, they shall pay the half only of the duty that goods of the same sort and quality, coming from foreign countries must pay, whether the said duty belongs to us or has been by us made over to private persons; and as for lead, copper and other metals, we have granted and do grant, to the said company, entire freedom of all duties laid or to be laid upon them. But if the said company takes goods upon freight in her vessels, she shall be bound to let the same be declared, by her captains, at the offices of our farms, in the usual form and the said goods shall pay the full duty. In regard to such goods as the company shall import in those ports of our kingdom, named in the 15th article of the regulations of the month of April

last past, and likewise in those of Nantz, Brest, Morlais and St. Malo, for her account, as well from the lands granted to her as from the French islands in America, proceeding from the sale of goods, the produce of Louisiana, and intended for re-exportation to foreign countries, they shall be deposited in the custom house, warehouses of the ports at which they arrive, or in those of the company, in the form hereabove prescribed, until they be taken away; and when the clerks of the said company shall wish to send them abroad, by sea or land, as transit goods, which can only take place through the offices named in our regulations of last month, they shall be bound to take a pass (*acquit à caution*) containing an engagement to bring back, within a certain time, a certificate of the last frontier office they pass, and another of their unlading in a foreign country.

XXIX. If the company construct vessels in the lands granted to her, we consent to pay to her, as a bounty, out of our royal treasury, the first time the said vessels enter into the ports of our kingdom, a sum of six livres per ton, for all vessels not below two hundred tons burthen, and of nine livres also, per ton, for those not below two hundred and fifty tons, which sum shall be paid on delivery of certificates of the directors of the company in the said lands, showing that the said vessels have been built there.

XXX. We give the said company leave to deliver special licenses to vessels of our subjects to trade in the lands granted to her under such conditions as she may think fit; and it is our pleasure that the said vessels, bearing licenses of the said company, enjoy the same rights, privileges and immunities, as those of the company, as well on the stores, merchandise and goods, that shall be laden in them, as on the merchandise and goods they shall bring back.

XXXI. We shall deliver to the said company, out of our magazines, every year during the time of her charter, forty thousand pounds of gunpowder, for which we shall charge her no more than the prime cost.

XXXII. Our intention being that the greatest number possible of our subjects participate in the trade of this company and in the advantages we grant her, and that all sorts of persons may take an interest in it according to their fortunes; it is our pleasure that the stock of this company be divided in shares of five hundred livres each, the value of which shall be paid in exchequer bills, and the interest be due from the first of January of the present year; and when the directors of the said company shall have declared that a sufficient number of shares have been delivered, we shall close the books of the company.

XXXIII. The certificates of the said shares shall be made payable to the bearer, signed by the treasurer of the company, and approved by one of the directors. Two sorts of certificates shall be delivered, viz: certificates of single shares and certificates of ten shares.

XXXIV. Persons who may wish to send the certificates of the said shares to the country or abroad, may for greater security endorse

them, but the said endorsement shall not be considered as warranting the share.

XXXV. All foreigners may take as many shares as they think fit, though they should not reside in our kingdom; and we have declared and do declare that the shares belonging to the said foreigners shall not be subject to the right of *aubaine*, nor to any confiscation for cause of war or otherwise, it being our pleasure that they enjoy the said shares as fully as our subjects.

XXXVI. And whereas the profits and losses in trading companies are uncertain, and the shares of the said company can be considered in no other light than as merchandise, we permit all our subjects and all foreigners, in company or for their private account, to buy, sell and trade in them as they shall think fit.

XXXVII. Every shareholder, bearer of fifty shares, shall have a vote in the court of proprietors, and if he is bearer of one hundred shares he shall have two votes, and so forth, augmenting the number of votes by one for every fifty shares.

XXXVIII. The exchequer bills received in payment for the shares shall be converted in a stock, bearing four per cent. interest, the said interest to begin from the first of January of the present year; and as security for the payment of the said interest, we have pledged and assigned, do pledge and assign our revenues of the comptrol of notaries' deeds, of the small seal and of lay registration, in consequence whereof the commissioners of our council, that we shall name to that end, shall make in our name and in favor of the said company, bonds for a perpetual and inheritable annuity of forty thousand livres, each bond representing the interest of a capital of one million, at four per cent., against the finance receipts that shall be delivered by the treasurer of our royal treasury, in office this present year, who shall receive from the said company one million of exchequer bills at each payment, until the moneys deposited for shares in the said company shall be exhausted.

XXXIX. The interest of said annuities shall be paid, viz. the interest of the present year, in the four last months of the year, and the interest of the following years in four instalments, quarterly, by our farmer of the control of notaries' deeds, small seals and lay registrations, in the hands of the treasurer of the said company, who shall deliver receipts thereof, approved by three directors, and, for the first time only, a collated copy of these letters and of their nominations.

XL. The directors shall make use, for the trade of the company, of the interest of the present year on the bonds delivered in favor of the company; but we very expressly forbid them to make use of any part of the interest of the following years, or mortgage them in any way whatever; it being our pleasure that the proprietors do receive regularly the interest of their shares at the rate of four per cent. a year, beginning with the month of January next year, and the first payment of interest to take place, for six months, on the first of July following, and so forth every six months.

XLI. Whereas, it is necessary that immediately after the registration of these present letters, there be persons who take charge of all that may be required for the opening of the books and other particulars incident on the beginning of the said company, which will bear no delay, we shall name, for this time only, the directors we shall choose to that effect, who shall be empowered to regulate and administer the affairs of the said company, the proprietors of which may, after two years have elapsed, in a general court, nominate three new directors, or continue them for three years, if they think fit; and so forth every three years, the said directors to be chosen only among Frenchmen and inhabitants of the kingdom.

XLII. Every year, at the end of the month of December, the directors shall close the general balance of the affairs of the company, after which they shall call, by bills publicly stuck up, a general court of proprietors of the said company, in which court the dividends, accruing from the profits of the said company, shall be fixed and settled.

XLIII. Considering the great number of shares that will be delivered by the said company, we find necessary to establish, for the ease of our subjects, a regular order for the payment of the interest and dividend, so that every shareholder may know what day he may appear at the office to receive, without any delay, the sums due to him. In consequence, it is our pleasure that the interest of the said shares, as likewise the dividend accruing to them out of the profits of the trade, be paid according to the number of the said shares, beginning by number one and so forth; the company not being at liberty to make any alteration in the said order, and every week the directors shall cause bills to be stuck up at the door of the office of the said company, and advertisements inserted in the public newspapers, containing the numbers that are to be paid in the following week.

XLIV. Neither the shares of the company, nor her effects, nor the salaries of the directors, officers or agents of the said company, shall be subject to distress by any person or under any pretence whatever, not even for our own moneys and affairs, excepting only that the creditors of the shareholders shall be at liberty to attach in the hands of the treasurer and book-keeper of the said company the moneys due to the said shareholders, according to the accounts closed by the company, to which the said creditors shall be bound to submit, without obliging the said directors to show them the state of the company's effects or render them any account, neither shall the said creditors establish any commissaries or sequestrees of the said effects, and all acts contrary to the present edict shall be void.

XLV. It is our pleasure that the exchequer bills, delivered in hands of the treasurer of our royal treasury for the said Western Company, be brought by him to the town hall of our good city of Paris, where, in the presence of M. Bignon, councillor of state in ordinary, late *Prevot du marchands* (mayor), M. Trudaine, councillor of state, present *Prevot du marchands*, Messrs. de Sorre, le Vertoy, Harlon



and Boucot, who signed the exchequer bills with them, and of the municipal officers of the said town hall who shall or may wish to be there, the said exchequer bills be publicly burned, immediately after the delivery of each bond, and after the draft of a verbal process mentioning the registers, numbers and sums, the inscription and discharge thereof on the said registers, which verbal process shall be signed by the said Messrs. *Prevots du marchands* and other persons named in the present article.

XLVI. The directors, or a majority of them, shall nominate all the agents of the company, captains and officers serving on her vessels, military and judicial officers, and all others employed in the lands granted to her, and they shall be at liberty to dismiss them whenever they think fit; and the said nominations and dismissions shall be signed by no less than three directors.

XLVII. The said directors shall not be troubled or constrained in their persons or effects for the affairs of the company.

XLVIII. They shall settle the accounts of the clerks and agents, as well in France as in the granted lands of the company, and those of the correspondents, and the said accounts must be signed by no less than three of the said directors.

XLIX. True and exact books shall be kept for the cash, invoices, sale accounts, expeditions and ledger, by double entry, as well at the general direction at Paris as by the clerks and commissioners of the company in the country and lands granted to her; the said books shall be endorsed and signed by the directors, and they may serve as evidence before our courts of justice.

L. We bestow in gift to the said company the forts, warehouses, houses, cannons, arms, gunpowder, brigantines, boats, canoes, and all other effects and utensils we possess at present in Louisiana, all of which shall be delivered over to her on our orders, which shall be despatched by our navy council.

LI. We bestow likewise in gift to the said company, the vessels, goods and effects which M. Crozat delivered over to us, as explained in the decree of our council of the 23d day of the present month, of whatever nature they may be, and whatever may be their amount, provided that in the course of her charter she carry over to the lands granted to her, no less than six thousand white persons, and three thousand negroes.

LII. If, after the twenty-five years of the charter we grant hereby to the said company shall have expired, we should not think fit to grant her a prolongation thereof, all the islands and lands she shall have inhabited or peopled, as likewise the manorial rights, quit and other rents, due by the inhabitants, shall remain her property forever, with liberty to dispose of them as she shall think fit, and we will never seek to recover the said lands or islands for any cause, occasion or pretence whatever, having given them up from this present moment, on condition that the said company shall not sell the said lands to any other persons than our subjects; and as to the forts, arms and

ammunitions, they shall be delivered up to us by the said company, to whom we shall repay the value of the same according to an equitable valuation.

LIII. Whereas, in the settlement of the lands granted to the said company by these present letters, we have chiefly in view the glory of God, by procuring the salvation of the Indian savage and negro inhabitants whom we wish to be instructed in the true religion, the said company shall be bound to build churches at her expense in the places of her settlements, as likewise to maintain there as many approved clergymen as may be necessary, either as vicars, or under any other suitable title, to preach the holy gospel, celebrate Divine service, and administer the sacraments under the authority of the bishop of Quebec, the said colony remaining as heretofore in his diocese, the livings of the vicars and other clergymen, maintained by the company, being in his gift and advowson.

LIV. The said company shall be at liberty to take for her coat of arms an escutcheon vert, waved at the base argent, lying thereon a river god proper, leaning on a cornucopia or; in chief azure service of fleur de lys or, bearing upon a closet or; supporters two savages; crest a trefoiled crown; and we grant her the said arms that she may make use of them on her seals, and place them on her buildings, vessels, guns, and wherever she may think fit.

LV. We give the said company leave to draw up and enact the necessary statutes and regulations for the government and direction of her affairs and trade, as well in Europe as in the lands granted to her, and the said statutes and regulations shall be confirmed by our letters patent, in order that the shareholders of the said company be bound to execute them according to their form and tenor.

LVI. Whereas it is not our intention that the special protection we grant to the said company be in any respect prejudicial to our other colonies whom we wish also to favor, we forbid the said company to take or receive under any pretence whatever, any inhabitant established in our colonies, and transfer them to Louisiana, unless they have obtained the necessary permission in writing of the governors general of our said colonies, authenticated by the *Intendants* or chiefs of the commissariat.

Wherefore, we do order our trusty and beloved councillors, holding our court of parliament, audit office, and court of aids in Paris, to let the present letters be read, published and registered, and their contents holden, obeyed and executed, according to their form and tenor, notwithstanding any proclamation, declaration, regulation, judgment, or any thing else contrary to their contents, all of which we have made and do make void by these present letters, in the copies of which, authenticated by one of our trusty and beloved councillor secretaries, faith shall be had as in the original: For such is our pleasure. And in order that this may endure forever, we have attached our seal to these present letters. Given in Paris in the month of August, in the

year of our Lord one thousand seven hundred and seventeen, and of our reign the second.

(Signed)

LOUIS.

And lower, for the King, Le duc d'ORLEANS, Regent, present. PHELYPEAUX vidit DAGUESEAU. Seen at the council Villeroy, and sealed with the great seal of green wax.

Registered, after having been heard, and, at the demand of the king's attorney general, to be executed according to their form and tenor, although the statutes which shall be drawn up hereafter by the Western Company, can only be executed after they are confirmed by letters patent of the king, registered in our court. And authenticated copies of these present letters shall be sent to the inferior courts of *Bailliage* and *Sine-schaussée*, of our good duchy, to be there read, published and registered; we enjoin the deputies of the king's attorney general to see this executed, and to report the same to the court within a month. Paris, in parliament, the sixth of September, one thousand seven hundred and seventeen.

(Signed)

GILBERT.

Examined with the original by us, councillor secretary of the king, household crown of France and his finance.

#### NOTICE TO THE PUBLIC.

The public are informed that the book subscripive for shares in the Western Company lies at the general bank, rue St. Aroye.

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### TITLE VIII.

ARREST DU CONSEIL D'ESTAT DU ROY CONCERNANT LA RÉUNION DES COMPAGNIES DES INDES ORIENTALES ET DE LA CHINE, A LA COMPAGNIE D'OCCIDENT, DU 17 JUIN, 1719.

Le Roy s'estant fait représenter en son Conseil son Edit du mois de May dernier, Envoyé au Parlement de Paris le 23 dudit mois, Et par consequent réputé et tenu pour Enregistré, suivante les Lettres Patentes de Sa Majesté du 26 Aoust, 1718. Registrées au dit Parlement le mesme jour, le Roy y seant en son Lit de Justice; Par lequel Edit Sa Majesté auroit réuni à la Compagnie d'Occident le Privilege Exclusif de faire seule à l'avenir le Commerce des Indes Orientales, ainsi qu'il est plus amplement porté par ledit Edit; Ouy le Rapport et tout considéré. SA MAJESTE ESTANT EN SON CONSEIL, de l'avis de Monsieur le Duc d'Orleans Regent, a Ordonné et ordonne que son Edit du mois de May dernier, porté au Parlement de Paris le 23

dudit mois de May, et par consequent réputé et tenu pour Enregistré, au terme de l'Article II, des Lettres Patentes registrées audit Parlement, le Roy y séant en son Lit de Justice, le 26 du mois d'Aoust, 1718, sera executé selon sa forme et teneur, et attaché sous le Contre-scel du present Arrest, ainsi qu'une Expedition des Lettres Patentes dudit jour 26 Aoust, pour le tout estre envoyé aux Bailliages et Seneschaussées du Ressort dudit Parlement de Paris, afin qu'il y soit enregistré conjointement; Et le contenu observé sous les peines y portées; ORDONNE aussi que le present Arrest sera executé nonobstant toutes oppositions et tous autres empeschemens quelconques, pour lesquels ne sera différé, et dont si aucuns interviennent; Sa Majesté s'en reserve et à son Conseil la connoissance, et l'interdit à tous autres Juges. FAIT au Conseil d'Estat du Roy, Sa Majesté y estant, tenu à Paris le dix-septième jour du Juin mil sept cens dix-neuf.

(Signé)

PHELYPEAUX.

LOUIS par la grâce de Dieu Roy de *France* et de *Navarre*: A nos amez et feaux Conseillers en nos Conseils, le S.<sup>m</sup> Intendans et Commissaires départis pour l'exécution de nos ordres dans les Provinces et Generalitez du Ressort de nostre Cour de Parlement de Paris, chacun en droit soy, SALUT: De l'avis de nostre tres cher et tres amé oncle le Duc d'Orleans Regent, nous vous mandons et enjoignons par ces presentes signées de nous, de tenir la main à l'exécution de l'arrest cy-attaché sous le contre-scel de nostre chancellerie, cejourd'huy donné en nostre Conseil d'Estat, nous y estant, concernant la réunion des Compagnies des Indes et de la Chine, à la Compagnie d'Occident. Commandons au premier nostre huissier ou sergent sur ce requis, de signifier le dit arrest à tous qu'il appartiendra à ce que personne n'en ignore, et de faire pour son entiere execution tous actes et exploits necessaires sans autre permission. Voulons qu'aux copies du dit arrest et des presentes collationnées par l'un de nos amez et feaux counseillers-secretares, foy soit ajoûtée comme aux originaux; car tel est nostre plaisir. Donné à Paris le dix-septième jour de Juin, l'an de grace mil sept cens dix-neuf. Et de nostre Règne le quatrième.

(Signé)

LOUIS.

Et plus bas, par le Roy le Duc d'Orleans Regent present. Phelypeaux. Et scellé.

Pour le Roy.—Collationné à l'Original par nous Conseiller Secretaire du Roy, Maison, Couronne de France et de ses Finances.

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*Edit du Roy, Portant Réunion des Compagnies des Indes Orientales et de la Chine, à la Compagnie d'Occident. Donné à Paris au mois de May 1719.*

LOUIS par la Grace de Dieu Roy de France et de Navarre: A tous presens et à venir, Salut. Depuis nostre avenement à la Couronne,

Nous avons esté occupez à chercher les moyens de reparer les Epuise-  
mens que de longues Guerres avoient causées à l'Estat, Et à pro-  
curer à nos Sujets la felicité et l'abondance qu'ils meritent. Nous  
voyons avec satisfaction que la circulation de l'Argent est très vive,  
et que le Commerce se restablit, mais nostre objet ne peut estre  
rempli que par de plus grands avantages. Le credit que la Com-  
pagnie d'Occident s'est acquis, quoy que nouvellement formée, Nous  
a determinez d'examiner la situation des anciennes Compagnies, Et  
Nous avons vû avec douleur que malgré les bienfaits qu'elles ont reçu  
de la liberalité du feu Roy nostre tres honore Seigneur et Bisayeul,  
Elles n'ont pû se soutenir. La Compagnie des Indes Orientales  
establie par Edit du mois d'Aoust 1664, au lieu d'employer à l'agran-  
dissement du Commerce le privilege exclusif qui luy avoit esté accordé  
pendant Cinquante années, Et les secours réitérez d'Argent et de  
Vaisseaux que le feu Roy luy avoit donnez, après avoir contracté des  
dettes dans le Royaume et aux Indes, a totalement abandonné sa  
Navigation, et s'est determinée à ceder son Privilege à des particu-  
liers moyennant dix pour cent du produit des ventes en France, et  
cinq pour cent des Prises, Et la retenue des cinquante livres par Ton-  
neau des Marchandises de Sortie, et des soixante-quinze livres de  
celles d'Entrée qui luy avoient esté accordez par forme de gratification.  
Nous sçavons que ce n'est point à la nature de ce Commerce, que le  
manque de succès doit estre attribué, mais à la mauvaise Regie, Et  
que cette Compagnie à l'exemple de celles des Estats voisins auroit  
pû rendre ce Commerce utile à ses Actionnaires et au Royaume.  
L'Entreprise avoit esté formée avec un fonds qui n'estoit pas suffisant,  
les Directeurs ont consommé une partie de ces fonds par des reparti-  
tions prematurées, et des droits de presence dans un temps où il n'y  
avoit aucuns profits, et pour suppléer à ces fonds l'on avoit fait des  
Emprunts sur la Place à des interets excessifs, jusqu'à dix pour cent,  
et l'on avoit pris en d'autres temps de l'Argent à la grosse aventure,  
à raison de cinq pour cent par mois, en sorte que le benefice du Com-  
merce se trouvoit épuissé et au de-là, par les charges que l'on y avoit  
mises. Cependant malgré cette mauvaise administration, le feu Roy  
continuant toûjours la protection qu'il avoit accordée à cette Com-  
pagnie, et dans la vue de la mettre en estat de payer ses dettes, luy  
a accordé par sa Declaration du 29 Septembre 1714, la continuation  
de son privilege pendant dix années, à commencer du premier Avril  
1715. Mais au lieu de remplir un objet aussi legitime, les Indiens  
nous ont porté des plaintes réitérées que la Compagnie ne leur payoit  
ni interets ni Capitaux, et que depuis plus de seize ans, elle n'avoit  
envoyé aucuns Vaisseaux à Suratte; ainsi ce Commerce devenu lan-  
guissant depuis plusieurs années, se perdrait entierement s'il n'y estoit  
pourvû, parce que les particuliers qui ont acquis le privilege de la  
Compagnie, estant chargez de luy payer un droit de dix pour cent,  
ne peuvent faire un Commerce de concurrence avec l'estranger, et que  
d'ailleurs dans la crainte d'estre arrestez pour les dettes de la Com-  
pagnie, ils n'osent envoyer leurs Vaisseaux à Suratte, Ville principale

du Mogol, d'où se tirent les Cottons en laine et silez, et presque toutes les Drogueries et Epiceries des Indes et de l'Arabie; en sorte que nos sujets sont obligez de tirer de l'estranger la plus grande partie des Marchandises des Indes qui se consomment dans le Royaume, et de celles propres pour le Commerce de la Coste de Guinée et du Senegal, qu'ils payent au triple de la valeur, et se verroient frustrer pour toujours de l'avantage d'avoir dans le Royaume ces sortes de Marchandises. Nous avons aussi esté informez que la Compagnie particuliere de la Chine, Etablie par Arrest de nostre Conseil du 28. Novembre 1712. et par les Lettres Patentes expedées en consequence le 19, Fevrier 1713. et qui faisoit cy-devant partie de la Concession de la dite Compagnie des Indes, n'a fait aucun usage du privilege exclusif qui luy a esté attribué, et que ce Commerce est encore dans un plus grand derangement, s'il est possible, que celui des Indes. Ce seroit manquer à ce que nous devons à nous-mesmes et à nos sujets, de laisser subsister plus long-temps un pareil desordre dans un des plus considerables Commerces de nostre Royaume, et nous avons crû qu'il estoit convenable au bien de nostre Estat, de restablir et d'augmenter le Commerce des François aux Indes, et de conserver l'honneur de la Nation, en payant à ces Peuples les dettes contractées par la Compagnie, pour parvenir à l'execution de ce dessein, nous avons resolu de supprimer les privileges accordez aux Compagnies des Indes et de la Chine, et de les réunir à celle d'Occident. L'Etablissement de cette Compagnie formée depuis quelque temps, la protection que nous lui accordons, sa bonne administration, le credit qu'elle s'est acquise, les fonds considerables qu'elle aura par la jonction de ces differentes Compagnies, tous ces avantages nous font juger que nous ne pouvons remettre en de meilleures mains le Commerce des Indes et de la Chine; d'ailleurs par ce moyen et par la jonction qui a esté faite à la Compagnie d'Occident de celle du Senegal, nous réunissons dans une seule Compagnie un Commerce qui s'étend aux quatre Parties du monde. Cette Compagnie trouvera dans elle-mesme tout ce qui sera necessaire pour faire ces differens Commerces; Elle apportera dans nostre Royaume les choses necessaires, utiles et commodes; Elle enverra les superflues à l'estranger; Elle entretiendra la Navigation, et formera des Officiers, des Pilotes et des Matelots, et toute sa Regie se faisant dans le mesme esprit, il en naîtra l'union et l'economie dont depend le succès de toutes les Entreprises de Commerce. A CES CAUSES et autres à ce nous mouvans, de l'avis de nostre tres cher et tres amé Oncle le Duc d'Orleans petit Fils de France Regent, de nostre tres cher et tres amé Cousin le Duc de Bourbon Prince de nostre Sang, de nostre tres cher et tres amé Oncle le Duc de Chartres premier Prince de nostre Sang, de nostre tres cher et tres aimé Oncle le Comte de Toulouse Prince légitimé, et autres Pairs de France, grands et notables Personnages de nostre Royaume, et de nostre certaine science, pleine puissance et autorité Royale, nous avons par le present Edit perpetuel et irrevocable, dit, statué et ordonné, disons, statuons et ordonnons, Voulons et nous plaist,

I. Que les Privileges accordez à la Compagnie des Indes Orientales, par Edit du mois d'Aoust 1664, confirmez et augmentez par la Declaration du mois de Fevrier 1685. Et par plusieurs Arrests et autres Declarations, et prorogez par celle du 29 Septembre 1714. Et ceux accordez à la Compagnie particuliere de la Chine par Arrest de nostre Conseil du 28 Novembre 1712. Et les Lettres Patentes expedées en consequence le 19 Fevrier 1713 demeurent éteints, revoquez et supprimez, ainsi que nous les éteignons, revoquons et supprimons.

II. Avons accordé et accordons à la Compagnie d'Occident, le Privilege de Negociier seule, à l'exclusion de tous nos autres Sujets, depuis le Cap de Bonne-Esperance, jusques dans toutes les Mers des Indes Orientales, Isles de Madagascar, Bourbon et France, Coste de Sofola en Affrique, Mer Rouge, Perse, Mogol, Siam, la Chine et le Japon, mesme depuis le Détroit de Magellan et le Maire dans toutes les Mers du Sud, pour le temps qui reste à expirer de celui accordé à la dite Compagnie d'Occident par l'Article II. de nos Lettres Patentes du mois d'Aoust 1717.

III. Faissons deffenses à tous nos autres Sujets, de faire aucun Commerce dans les dits Lieux pendant la durée du privilege attribué à la Compagnie d'Occident, à peine de confiscation à son profit, des Vaisseaux, armes, munitions et marchandises.

IV. Nous donnons et concedons à la Compagnie d'Occident en toute propriété, les terres, isles, forts, habitations, magazins, meubles, immeubles, droits, rentes, vaisseaux, barques, munitions de guerre et de bouche, negres, bestiaux, marchandises, et generalemente tout ce que la Compagnie des Indes Orientales et celle de la Chine ont pû acquerir ou conquerir; ou qui leur a esté concedé, tant en France qu'aux Indes et à la Chine, suivant l'estimation qui en sera faite sur les Livres, Registres, Letters, Papiers, Factures, Titres et Enseignemens qu'elles seront tenues de représenter à cet effet, huitaine après l'Euregistrement du present Edit; pour en jouir par la dite nouvelle Compagnie, comme de chose à elle appartenante, ainsi qu'en ont joui ou dû jouir les Compagnies des Indes et de la Chine, à la charge seulement de payer, tant aux François qu'aux Indiens, toutes les dettes legitimes de la Compagnie des Indes et de la Chine, à moins qu'après l'estimation des dits Effets, et la liquidation des dettes, il n'y eust de l'excédent dans les dits Effets, auquel cas la Compagnie d'Occident sera tenue aussi de payer le dit excédent, de maniere qu'elles n'en puissent estre recherchées ni inquietées, duquel payement la dite Compagnie sera tenue de rapporter les preuves et Titres justificatifs, et sans que la dite Compagnie d'Occident soit tenue de payer aucune autre chose à celle des Indes et de la Chine.

V. Les Cinquante livres par chaque Tonneau de marchandises de France, et Soixante-quinze livres aussi pour chaque Tonneau de marchandises des Indes, que nous faisons payer à la Compagnie par forme de gratification, ensemble les dix pour cent sur le produit des ventes des marchandises venues ou à venir sur les Vaisseaux des Particuliers à qui elle a cedé son privilege, appartiendront à la Compagnie d'Occident.

VI. Et pour mettre la Compagnie d'Occident en estat de satisfaire les Creanciers de celle d'Orient, tant en France qu'aux Indes, et de porter à l'avenir son Commerce à toute l'Estendue qu'il doit avoir, ce qui ne se peut executer que par un fonds considerable; nous luy avons permis et permettons de faire pour Vingt-cinq millions de nouvelles actions, qui ne pourront estre acquises qu'en argent comptant, et en payant au Caissier de la dite Compagnie d'Occident Cinq cens cinquante livres pour chaque action, lesquelles seront de mesme nature que les cent millions de la dite Compagnie d'Occident qui sont dans le public, et dont les numeros suivront immediatement celuy des derniers numeros des actions qui composent les cent premiers millions; et en consideration des dix pour cent que les acquereurs payeront au-dessus du pair, nous voulons qu'elles jouissent des mesmes avantages que les autres actions.

VII. Lesdites actions seront signées par le Caissier de la Compagnie, visées de l'un des Directeurs et scellées de son Sceau, et pour en faciliter l'acquisition, il sera ouvert un Livre dans lequel, tant nos sujets que les estrangers pourront souscrire, en payant comptant les dix pour cent d'excédent, et le capital de l'action en vingt mois, par portions égales de cinq pour cent par mois, sauf à ceux qui voudront payer comptant, de remettre leurs fonds à la Caisse de la Compagnie sans pretendre aucun escompte pour le prompt payement.

VIII. Le Caissier de ladite Compagnie ne delivrera aucune action qu'au fur et à mesure des payemens effectifs du capital qui luy seront faits; et faute par lesdites actionnaires de remplir leurs soumissions dans les termes portez par le present Edit, ils perdront les dix pour cent excédens du capital qu'ils auront payez.

IX. Permettons à ladite Compagnie de faire venir des pays de sa concession, toutes sortes d'etoffes de soye pure et de soye et cotton mêlées d'or et d'argent, et d'ecorses d'arbres, et des toiles de cotton teintes, peintes et rayées de couleurs: Voulons que lesdites marchandises prohibées dans le Royaume ne puissent estre vendues que sous la condition expresse de la sortie pour l'estranger, et qu'à cet effet elles soient mises en Entrepot dans les Magasins de nostre Ferme Generale, sous deux clefs, dont les Fermiers Generaux ou leurs Commis en auront une, et les Directeurs de la Compagnie ou leurs proposez l'autre; et en prenant les autres precautions necessaires pour empescher que les dites marchandises ne soient vendues pour la consommation du Royaume.

X. Pourra ladite Compagnie faire aussi venir des pays de sa concession, toutes sortes de toiles de cotton blanches, soyes crûes, caffè, drogueries, epiceries, Metaux et autres, excepté celles prohibées par le precedent article, en payant les droits qui se payent actuellement par la Compagnie des Indes, suivant et conformement aux Edits, declarations des Roys nos predecesseurs, arrests et reglemens.

XI. S'il est resté aux Indes quelques marchandises ou effets appartenans à des particuliers, dont les vaisseaux y auront esté en vertu des permissions, traitez ou cessions de privilege de ladite Compagnie



des Indes, la valeur leur en sera remboursée par ladite Compagnie d'Occident.

XII. Voulons que la Compagnie d'Occident soit doresnavant nommée et qualifiée *Compagnie des Indes*, et qu'elle porte les mesmes armes dont la Compagnie d'Occident s'est servie jusqu'à present.

XIII. Maintenons et confirmons ladite Compagnie dans tous les droits et privileges à elle accordez par Edit du mois d'Aoust, 1664, declaration du mois du Fevrier, 1685, et autres declarations et reglemens rendus en faveur de son commerce, sans aucune exception, comme s'ils estoient tous rappelés par ces presentes, tout ainsi que la Compagnie des Indes en jouit, excepté ceux qui ont esté revoquez ou modifiez, et sans prejudice des droits de l'Amiral de France, dont il a joui ou dû jouir, conformément à la declaration du 3 Septembre, 1712, et reglemens faits en consequence.

Si donnons en mandement à nos amez et feaux conseillers les gens tenans nostre Cour de Parlement, Chambre des Comptes et Cour des Aydes à Paris, que ses presentes. ils ayant à faire lire, publier et registrer, et le contenu en icelles, garder, observer et executer selon leur forme et teneur, nonobstant tous edits et declarations à ce contraires: Voulons qu'aux copies d'icelles collationnées par l'un de nos amez et feaux conseillers-secretaires foy soit adjoutée comme à l'original, Car telle est nostre plaisir. Et afin que ce soit chose ferme et stable à toujours, nous y avons faite mettre nostre scel. Donné à Paris au mois de May, l'an de grace mil sept cens dix-neuf, et de nostre Règne le quatrième.

(Signé)

LOUIS.

Et plus bas, par le Roy, le Duc d'Orleans Regent present. Phelypeaux, *Visa*, de Voyer d'Argenson, Veû au Conseil, Villeroy. Et scellé du grand Sceau de cire verte.

### LETTRES PATENTES.

LOUIS par la grâce de Dieu Roy de *France* et de *Navarre*: A nos amez et feaux conseillers les gens tenant nostre Cour de Parlement à Paris, SALUT: Par arrest en forme de reglement de nous rendu en nostre conseil le 21 Aoust dernier pour les causes y contenuës, nous avons ordonné ce que nous entendions estre à faire et observer par nostredite Cour sur l'execution de nos edits et declarations, arrests de nostre conseil et lettres patentes sur iceux, ensemble sur le temps et la forme des remonstrances que de nostre grace speciale nous luy avons permis de nous adresser avant leur enregistrement, et par iceluy pourvû à plusieurs abus préjudiciables à nostre autorité, et voulant que ledit arrest soit executé de point en point selon sa forme et teneur, sans qu'en aucune maniere et sur quelque prétexte que ce soit il y soit contrevenu, nous avons fait expedier nos lettres sur ce necessaires. A ces causes et autres à ce nous mouvans, de l'avis de nostre tres cher et tres amé oncle le Duc d'Orleans, Petit fils de France Regent, de nostre tres cher et tres amé cousin le Duc de Bourbon, de

nostre tres cher et tres amé cousin le Prince de Conty, princes de nostre sang, de nostre tres cher et tres amé oncle le Duc du Maine, de nostre tres cher et tres amé oncle le Comte de Toulouse Princes legitimes, et autres pairs, grands et notables personnages de nostre Royaume qui ont veü ledit arrest cy-attaché sous le Contrescel de nostre Chancellerie, et de nostre grace speciale, pleine puissance et autorité Royale, nous avons dit, statué et ordonné, et par ces presentes signées de nostre main, disons, statuons et ordonnons, voulons et nous plaist ce que suit.

I. Que le Parlement de Paris puisse continuer de nous faire des remonstrances sur nos ordonnances, edits, declarations et lettres patentes qui luy seront adressez, pourvü que ce soit dans la huitaine, ainsi qu'il est porté par la declaration du mois de Septembre, 1715, et dans la forme prescrite par l'article III, du Titre I, de l'ordonnance de 1667. Luy deffendons de faire aucunes remonstrances, deliberations, ni representations sur nos ordonnances, edits, declarations et lettres patentes qui ne luy auront pas esté adressez.

II. Que faite par ledit Parlement de Paris de faire ses remonstrances dans la huitaine du jour que lesdits edits, declarations et lettres patentes, lui auront été presentez, ils soient reputez et tenus pour enregistrez; et en consequence qu'il en sera envoyé une expedition en forme aux Baillages et Senechaussées du Ressort du Parlement de Paris, pour y estre executez selon leur forme et teneur, et le contenu en iceux estre observé sous telles peines qu'il appartiendra, et en cas de contravention, tant par ledit Parlement de Paris, que par lesdits Baillifs et Senechaux dans leurs arrests, sentences et jugemens, qu'ils seront par nous cassez et annullez suivant la forme prescrite par l'ordonnance.

III. Que lorsque le Parlement aura délibéré de faire des remonstrances, dans la forme et dans le temps cy-dessus marquez, les gens du Roy se retireront vers nous pour nous en informer, et nous leur feront sçavoir si nous desirons les recevoir de vive voix ou par escrit.

IV. Au premier cas, nous indiquerons au Parlement le jour auquel nous trouverons bon d'écouter ses remonstrances, et au second cas, faite par le Parlement de remettre ses remonstrances par écrit à l'un de nos Secretaires d'Estat et de nos Commandemens, huit jours après que nous leur en aurons donné l'ordre, les edits, declarations et lettres patentes seront censez enregistrez, ainsi qu'il est porté par l'article II. des presentes.

V. Après que nous aurons écouté ou reçu les Remonstrances, s'il nous plaist d'ordonner que les Edits, Declarations et Lettres Patentes soient enregistrées, le Parlement sera tenu d'y satisfaire sans delay, sinon l'Enregistrement sera censé en avoir esté fait, et il en sera envoyé des Expéditions suivant qu'il est expliqué au second article cy-dessus; sauf au Parlement après l'Enregistrement de faire de nouvelles remonstrances, auxquelles nous aurons tel égard qu'il appartiendra.

VI. Deffendons tres expressement audit Parlement d'interpreter les Edits, Declarations et Lettres Patentes qui luy auront esté adressez

de nostre ordre; et en cas que quelques articles luy paroissent sujets à interpretation, le Parlement de Paris pourra conformement à l'article III. du Titre premier de l'Ordonnance de 1667. Nous représenter ce qu'il estimera convenable à l'utilité publique, sans que l'exécution en puisse estre sursise, ni qu'aucun de nos Edits, Ordonnances, Declarations, Lettres Patentes ou Reglemens puissent estre interpretez ou modifiez par le dit Parlement de Paris, sous aucun pretexte.

VII. N'entendons que le Parlement de Paris puisse inviter les autres Cours à aucun Association, Union, Confédération, Consultation ni Assemblée par Deputez ou autrement, pour quelque cause ou occasion que ce soit, sans nostre expresse permission par écrit, à peine de desobéissance, et sous telle autre peine qu'il appartiendra, suivant l'exigence des cas.

VIII. Luy deffendons pareillement de faire aucun Assemblée ou Deliberation touchant l'administration de nos Finances, ni de prendre connoissance d'aucunes affaires qui concernent le Gouvernement de l'Estat, si nous n'avons agreable de luy en demander son avis par un ordre exprés.

IX. Declaronz nuls et de nul effet tous Procés verbaux, Arrests, Deliberations, Arrestez, et autres Actes que le dit Parlement de Paris pourroit avoir faits par le passé, ou pourroit faire à l'avenir au sujet des Edits, Declarations et Lettres Patentes qui ne luy ont pas esté adressez, soit par rapport aux affaires du Gouvernement de l'Estat, sur lesquelles nous ne luy aurons pas demandé son avis.

X. Ce faisant avons d'abondant cassé et annullé l'Arrest du Parlement de Paris du 20 Juin dernier, dont nous avons ordonné la cassation par celuy rendu en nostre Conseil le mesme jour.

Comme aussi avons cassé et annullé, cassons et annullons tous Arrests, Actes de publication d'affiches, de notification et autres qui pourroient avoir esté faits, soit contre l'Edit du mois de May dernier Enregistré en la Cour des Monnoyes où l'adresse en avoit esté faite, soit au prejudice du dit Arrest du Conseil et de celuy du lendemain, ou des Lettres Patentes expedées sur iceluy, et adressées au Parlement qui ne les a pas encore enregistrées.

Avons pareillement cassé et annullé l'Arrest du Parlement de Paris du 12 de ce mois, comme attentatoire à l'autorité Royale, et toutes les Deliberations ou procedures qui ont precedé et suivi le dit Arrest, ou qui pourroient estre faites à l'avenir sur ce qu'il contient, et sur toutes autres matieres semblables; Deffendant au Parlement de traiter de telles affaires que lors que nous voudrons luy faire l'honneur de l'en conslter.

Voulons que les dits Arrests, Arrestez, Deliberations, Procés verbaux et autres Actes faits en consequence, soient rayez et biffez dans les Registres du Parlement, et par tout ailleurs où besoin sera, et qu'en marge d'iceux mention soit faite du dit Arrest et de ces Presentes qui seront leës, publiées et affichées tant dans nostre bonne Ville de Paris, que dans les Villes et principaux lieux du Ressort; A l'effet de quoy Copies dûement collationnées en seront envoyées directement aux

Bailliages, Seneschaussées et par tout où besoin sera, pour y estre Enregistrées à la diligence de nos Procureurs, qui seront tenus de nous en certifier au mois, peine d'interdiction.

Si vous Mandons que les Presentes vous ayez à faire lire, publier et Enregistrer, et le contenu en icelles garder et observer de point en point selon leur forme et teneur, sans que pour quelque cause ou pre-texte que ce soit il y soit contrevenu; Enjoignons à nostre Procureur General de nous avertir des contraventions, si aucunes y estoient faites mesme d'en informer, et à nos Baillifs, Seneschaux, Sieges Presidaux et à tous autres nos Juges de vostre ressort, que ces Presentes ils aient à faire pareillement lire, publier et enregistrer, et en certifier dans le mois, à peine d'interdiction: **CAR TEL EST NOSTRE PLAISIR.** Donné à Paris le vingt-sixième jour d'Aoust, l'an de grace mil sept cens dix-huit, et de nostre Regne le troisième.

(Signé)

LOUIS.

Et plus bas, par le Roy le Duc d'ORLEANS Regent present, **PHÉLYPEAUX.**

Le Roy seant en son Lit de Justice, de l'avis du Duc d'Orleans Regent, a Ordonné et ordonne que les presentes Lettres Patentes seront Enregistrées au Greffe de son Parlement, et que sur le reply d'icelles, il soit mis que lecture en a esté faite, et le dit Enregistrement ordonné, ce requerant son Procureur General, pour estre le contenu en icelles executé selon leur forme et teneur, et Copies collationnées envoyées aux Baillages et Seneschaussées du Ressort pour y estre pareillement lûes, publiées et registrées. Enjoint aux Substituts de son Procureur General de l'en certifier au mois. Fait en Parlement le Roy tenant son Lit de Justice dans le Chasteaux des Tuileries, le vingt-sixième jour d'Aoust mil sept cens dix-huit.

(Signé)

GILBERT.

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## TITLE IX.

**EDIT DU ROY, PORTANT CONFIRMATION DES PRIVILEGES ACCORDEZ, CONCESSIONS ET ALIENATIONS FAITES À LA COMPAGNIE DES INDES. DONNÉ À VERSAILLES AU MOIS DE JUIN 1725.**

LOUIS par la grace de Dieu Roy de France et de Navarre: A tous presens et à venir, **SALUT.** Une de nos principales attentions à nostre Avenement à la Couronne, ayant esté d'augmenter et faire fleurir le Commerce de nostre Royaume, nous avons au mois d'Aoust 1717 créé et établi une Compagnie de Commerce maritime, sous le nom de Compagnie d'Occident: Depuis cela ayant reconnu que diverses autres Compagnies de Commerce, établies sous le Regne du feu Roy

notre très honoré Seigneur et Bisayeul, estoient tombées dans un tel anéantissement, que nos sujets estoient obligez de tirer des Estrangers, les Marchandises que ces Compagnies auroient dû leur procurer; Nous avons jugé qu'il convenoit au bien de nostre Estat, de réunir les differens Privileges de commerce exclusif, cy-devant concedez à ces Compagnies particulieres, à celle d'Occident que nous avons nommée Compagnie des Indes, afin que toutes ces parties réunies pussent respectivement se soutenir; et nous avons la satisfaction de voir l'utilité de cette réunion, par la situation actuelle de ces mêmes parties de commerce, bien differente de ce qu'elle estoit lors de leur division; reconnoissant d'ailleurs qu'il est de nostre justice d'assurer la fortune d'un grand nombre de nos sujets de tous estats et conditions, qui se trouvent interessez dans la Compagnie des Indes, par les engagements qu'ils n'ont pû se dispenser de prendre dans les differentes opérations dont elle a esté chargée pendant nostre Minorité: Nous avons fait examiner en nostre Conseil les moyens d'affermir et soutenir de plus en plus la Compagnie des Indes, en confirmant en la forme la plus authentique les Privileges exclusifs de differens Commerces que nous luy avons concedez jusqu'à present, qui sont de nature à ne pouvoir estre utiles s'ils estoient libres, sans que la dite Compagnie puisse en pretendre aucun autre à l'avenir; nostre intention estant qu'elle serve à l'accroissement du commerce de nostre Royaume, sans affoiblir celuy des Negocians particuliers, et sans pouvoir s'immiscer en aucun temps dans nos Finances; en établissant pour toujours le gouvernement et l'administration des affaires de cette Compagnie, de maniere que nos sujets ayent une entiere confiance à un établissement que nous sommes resolu de soutenir de toute nostre autorité. A CES CAUSES et autres à ce nous mouvans, et de nostre certaine science, pleine puissance et autorité Royale, nous avons par le present Edit perpetuel et irrévocable, dit, statué et ordonné, disons, statuons et ordonnons, voulons et nous plaist.

I. Que la Compagnie des Indes créée sous le nom de Compagnie d'Occident par nos Lettres Patentes du mois d'Aoust 1717 jouisse à perpetuité des Concessions et Privileges que nous luy avons accordez, tant par les dites Lettres Patentes, que par nos Edits, Declarations et Arrests de nostre Conseil rendus depuis en sa faveur; desquelles Concessions et Privileges nous voulons que la dite Compagnie jouisse de la maniere que les Compagnies qui ont eu ces mêmes Privileges, en ont joui ou dû jouir, sauf les articles auxquels il sera dérogé, ou qui seront plus amplement expliquez par le present Edit.

II. La Compagnie des Indes jouira du privilege exclusif du Commerce dans toutes les Mers des Indes, et au delà de la Ligne, des Isles de Bourbon et de France, et de toutes les Colonies et Comptoirs établis et à établir dans les differens Estats d'Asie et de la Coste Orientale d'Afrique, depuis le Cap de Bonne Esperance jusqu'à la Mer Rouge, ainsi qu'en ont joui ou dû jouir la Compagnie des Indes Orientales, établie par Edit du mois d'Aoust 1664 pour cinquante années, dont les privileges ont esté confirmez et augmentez par la

Declaration du mois de Fevrier 1685, et prorogez pour dix autres années, à commencer du premier Avril 1715 par Declaration du 29 Septembre 1714, et autres Declarations et Arrests; Ensemble des privileges accordez à la Compagnie particuliere de la Chine, par Arrest de nostre Conseil du 28 Novembre 1712, et Lettres Patentes expedées en consequence le 19 Fevrier 1713. Deffendons à tous nos sujets, de quelque qualité et condition qu'ils puissent estre, de faire aucun commerce, directement, ni indirectement, dans les dites Mers et Pays de la Concession de la Compagnie des Indes, à peine de confiscation des vaisseaux et marchandises au profit de la dite Compagnie, ni de prendre aucun interest dans des Armemens particuliers qui pourroient se faire pour les dites Mers et Pays, même sous le Passeport et Banniere d'aucun Prince estranger, à peine de desobéissance.

III. La dite Compagnie jouira du commerce exclusif de la Traite des negres, poudre d'or, et autres marchandises à la coste d'Afrique, depuis la Riviere de Serre, Lyonne, inclusivement, jusqu'au Cap de Bonne Esperance, ainsi qu'en a joui ou dû jouir la Compagnie de Guinée qui avoit esté établie par Lettres Patentes du mois de Janvier 1685, et conformément aux Arrests de nostre Conseil des 27 Septembre 1720, et 14 Decembre 1722.

IV. La dite Compagnie ayant acquis le 15 Decembre 1718, le Privilege et les Effets de la Compagnie du Senegal, établie par Lettres Patentes du mois de Mars 1696, elle jouira seule du commerce de la traite des negres, cuir, morphil, poudre d'or, et autres marchandises, depuis le Cap blanc jusqu'à la Riviere de Serre, Lyonne, exclusivement, ainsi et de la même mainiere que la dite Compagnie du Senegal en a joui ou dû jouir.

V. Jouira pareillement la dite Compagnie, de la concession de la colonie de la Louisianne, et du commerce exclusif du Castor, conformément à nos Lettres Patentes du mois d'Aoust 1717, et Edit du mois de Decembre de la même année, rendus en faveur de la dite Compagnie.

VI. La Compagnie des Indes jouira du privilege du commerce de la coste de Barbarie, ainsi et de la même façon qu'en ont joui les Compagnies auxquelles elle a esté subrogée dans le dit commerce.

VII. La Compagnie d'Occident, devenuë depuis Compagnie des Indes, ayant porté en nostre Tresor Royal cent millions de livres, provenant du prix des premieres actions de cette Compagnie, dont nous nous estions chargez de luy faire quatre millions de rent annuelle, laquelle par nostre Edit du mois de Decembre 1717 enregistré en nostre Cour de Parlement le 31 du même mois, nous avons affecté sur nos fermes du controle des actes, du tabac et des postes; et depuis ayant jugé que la jouissance du privilege exclusif du tabac estoit convenable à la dite Compagnie, tant par la quantité de tabacs qu'elle peut tirer de ses Plantations, que pour la facilité que luy donne son commerce, de faire venir ceux qui sont necessaires pour l'exercice de ce privilege; nous aurions dans cette vûe accordé le bail de la ferme du tabac à la dite Compagnie d'Occident, par résultat de nostre Con-

seil du premier Aoust 1718, sous le nom de Jean l'Amiral, qui auroit continué d'en jouir, tant sous le nom de Compagnie d'Occident, que sous celui de Compagnie des Indes; mais cette jouissance ayant esté interrompue pendant la Regie des Commissaires de nostre Conseil, ordonnée par Arrest de nostre Conseil du 15 Avril 1721, pour les affaires de la dite Compagnie, et la reddition de ses comptes; nous avons au mois de Mars 1723 fait cesser la dite Regie, et restabli la dite Compagnie dans la jouissance de ses Effets; nous avons par arrest de nostre Conseil du 22 du dit mois de Mars 1723 abandonné la jouissance du privilege exclusif de la vente du tabac, à la Compagnie des Indes, pour estre quitte envers elle de deux millions cinq cens mille livres de rentes, à compte de trois millions, à quoy nous avons reduit par arrest de nostre Conseil du 19 Septembre 1719, les quatre millions de rentes constituées à la Compagnie d'Occident en consequence de nostre Edit du mois de Decembre 1717, et depuis, voulant assûrer pour toujours à la dite Compagnie des Indes la jouissance du dit privilege exclusif, tant pour encourager les plantations de tabac dans les colonies de sa concession, que pour assûrer de plus en plus l'estat et la fortune des actionnaires; nous avons ordonné par arrest de nostre Conseil du premier Septembre 1723 que par des Commissaires de nostre Conseil, il seroit passé à la Compagnie des Indes, ses directeurs stipulans pour elle, un contract d'alienation à titre d'engagement, du privilege exclusif de la vente du tabac, pour en jouir ainsi qu'en a joui ou dû jouir Verdier, dernier Fermier de la vente exclusive, à commencer la jouissance du premier Octobre 1723 et pour demeurer quitte par nous envers la dite Compagnie, de la somme de quatrevingt-dix millions sur la dite somme de cent millions qui sont l'ancien fonds de la dite Compagnie, par elle porté en nostre Tresor Royal en execution de l'Edit du mois de Decembre 1717. Et d'autant que nous reconnoissons de plus en plus que si ce même fonds de Quatrevingt-dix millions, qui est le patrimoine des actionnaires, estoit resté dans la circulation du commerce de la Compagnie, il luy auroit produit annuellement de bien plus grands benefices, que ne peuvent estre ceux de la vente exclusive du tabac, à quelque somme qu'ils puissent monter, et que par cette raison, et autres grandes et importantes considerations à nous connues, il est de nostre justice d'assûrer à la dite Compagnie en la meilleure forme et maniere, le dit privilege de vente exclusive: nous avons par le present Edit perpetuel et irrévocable confirmé et confirmons l'alienation faite en consequence du dit arrest du premier Septembre 1723 par les Commissaires de nostre Conseil, par contract passé le 19 Novembre ensuivant, à la dite Compagnie des Indes, du privilege de la vente exclusive du tabac dans l'estendue de nostre Royaume, Pays, Terres, et Seigneuries de nostre obéissance, sans que sous quelque pretexte que ce soit, elle puisse estre troublée en la jouissance du dit privilege.

VIII. La Compagnie des Indes exercera le privilege exclusif de la vente du Tabac, en son nom, comme chose à elle appartenant en pleine propriété, sans qu'il soit besoin qu'elle y soit autorisée par aucun

arrest de prise de possession; elle en jouira ainsi quelle en jouit ou doit jouir actuellement en consequence de l'arrest de nostre conseil du premier Septembre, 1723, sans pouvoir augmenter le prix des Tabacs; et les contraventions audit privilege seront punies conformément à nos edits, declarations, ordonnances et arrests rendus sur cette matiere, ainsi et de la mesme maniere que s'il s'exerçoit en nostre nom, attendu l'interest public dans cette Compagnie, dont nous entendons soutenir les privileges de toute nostre autorité.

IX. Encore que le Caffé estant du crû et culture des Pays de la Concession de la Compagnie des Indes, le privilege exclusif de l'introduction et vente de cette marchandises luy appartient de droit; neanmoins comme l'ancienne Compagnie des Indes Orientales en avoit negligé la Traite, nous en avons accordé nommément le privilege à la Compagnie des Indes, par les arrests de nostre conseil du 31 Aoust et 12 Octobre, 1723, que nous voulons estre executez, en confirmant ledit privilege à la Compagnie des Indes en tant que besoin est, à condition qu'elle ne pourra en aucun temps le vendre plus cher qu'elle le vend presentement, et sans déroger au privilege de la Ville de Marseille à cet égard, dans lequel nous l'avons maintenu par arrest de nostre conseil du 8 Fevrier, 1724.

X. Voulons que ladite Compagnie des Indes exerce ledit privilege exclusif de la vente du Caffé dans l'estenduë de nostre Royaume, en la mesme forme portée par l'Article VIII. du present edit pour le privilege du Tabac, et que les fraudes et contraventions qui pourroient y estre commises, soient jugées par les Juges à qui les connoissance en est attribuée par nostre declaration du 10 Octobre, 1723, registrée en nos Cours des Aydes, et conformément aux dispositions de ladite declaration.

XI. Comme en confirmant la Compagnie des Indes dans des privileges de commerce, qui ne peuvent se soutenir et réussir à l'avantage de nostre estat, qu'autant qu'ils seront exclusifs ainsi qu'ils l'ont toujours esté, et qu'ils seront gouvernez par le mesme esprit; nostre intention est que cette Compagnie serve à l'accroissement du commerce de nostre Royaume, sans affoiblir celuy des nogocians particuliers: nous declarons qu'à l'avenir elle ne pourra prétendre aucun autre privilege exclusif, tel qu'il puisse estre, que ceux qui luy sont confirmez par le present edit. Et attendue que l'experience nous a fait connoistre qu'autant l'establissement de cette Compagnie est utile et necessaire, lorsqu'elle est uniquement occupée du soin des Colonies importantes et des parties de commerce considerables que nous luy avons concedées, autant il est contre le bon ordre et contre nos interests, et ceux même de ladite Compagnie, qu'elle entre dans ce qui peut avoir rapport à nos finances; nous luy deffendons très expressément de s'immiscer en aucun temps, directement ou indirectement, dans nos affaires et finances; voulant qu'elle soit et demeure conformément à son institution, Compagnie purement de commerce, appliquée uniquement à soutenir celuy qui luy est confié, et à faire valoir avec sagesse et œconomie le bien de nos Sujets qui y sont



interressez, sans que les fonds de la Compagnie des Indes puissent estre en aucun cas employez à autre usage qu'à son commerce.

XII. Nous avons par arrest de nostre conseil du 23 Mars 1723, ordonné qu'il seroit passé à la Compagnie des Indes un contract d'alienation à titre d'engagement, des Droits composans nostre Domaine d'Occident, pour demeurer quitte envers elle de la somme de trois millions trois cens trente-trois mille trois cens trente-trois livres six sols huit deniers, à imputer sur les cent millions par elle portez en nostre Tresor Royal; mais ayant reconnu qu'il estoit plus convenable que le dit Domaine d'Occident ne fust point separé de nos Fermes Generales, Voulons et ordonnons que le dit arrest de nostre conseil du 23 Mars 1723 qui n'a eu aucune execution, demeure revoqué et comme non avenu, dechargeons la dite Compagnie des engagements et conditions y contenuës: et à l'égard des dix millions restans des cent millions portez en nostre Tresor Royal par la dite Compagnie, déduction faite des quatre-vingt-dix millions dont nous sommes acquittiez envers elle par l'alienation du privilege exclusif de la vente du tabac, Voulons qu'elle continue de jouir de la rente du principal des dits dix millions de contracts, à raison de trois pour cent, conformément à l'arrest du 19 Septembre 1719, et d'estre payée des arrerages, de six mois en six mois, sur le dit pied.

XIII. Le privilege exclusif des Lotteries, que nous avons accordé à la Compagnie des Indes par arrest de nostre conseil du 15 Fevrier 1724 demeurera éteint et supprimé: n'entendons néanmoins priver la dite Compagnie de la liberté de faire à l'avenir des Lotteries, en prenant nos permissions particulieres.

XIV. Nous avons par arrest de nostre conseil du 22 Mars 1723, fixé à cinquante-six mille le nombre des actions de la Compagnie des Indes; et comme depuis ce temps la compagnie en a retiré à son profit un nombre considerable, nous voulons que les actions retirées par la Compagnie, soient annullées et brulées en presence des actionnaires, au jour qui fera indiqué, au plus tard trois mois après la publication du present Edit, dont il sera dressé procès-verbal inseré dans le Registre des délibérations de la dite Compagnie.

XV. La Compagnie se trouvant chargée de rentes viageres constituées en execution de l'Arrest de nostre conseil du 20 Juin, 1724, en faveur des porteurs des Billets de Lotterie dont la Compagnie a reçu la valeur en argent ou en actions par elle retirées; nous voulons que le dit arrest soit executé selon sa forme et teneur, et que les rentes constituées en consequence soient exactement payées: lequel payement devant estre fait du mesme fonds affecté au payement du dividende des actions retirées, et considerant d'ailleurs les inconveniens qui ont resulté cy-devant de la multiplication des actions, qui ne peut estre faite qu'au grand préjudice des premiers actionnaires, nous defendons à la Compagnie des Indes de retirer ou racheter à l'avenir aucunes actions, que pour estre éteintes, annullées et brulées en presence des actionnaires convoquez, dont sera dressé proces-verbal, afin que le nombre effectif d'actions qui subsisteront, soit toujours connu des actionnaires.

XVI. Il sera tenu tous les ans dans le courant du mois de May, au jour indiqué, une Assemblée generale des actionnaires, dans laquelle sera lû et rapporté le Bilan general des affaires de la Compagnie de l'année précédente, et dans laquelle la fixation du dividende sera declarée.

XVII. Tout actionnaire qui aura déposé vingt-cinq actions à la Caisse generale de la Compagnie, dans le term prescrit par l'affiche d'indication de l'Assemblée generale, y aura entrée.

XVIII. Estant informé que plusieurs particuliers peuvent avoir employé en actions de la Compagnie des Indes, des fonds provenant de remboursement d'Effets qui leur tenoient nature de Propres; considerant qu'il peut y avoir à craindre pour les familles qui ont des fonds considerables en actions, qu'ils ne se dissipent par la facilité qu'il y a d'en disposer, nous voulons qu'il soit libre à l'avenir à tous propriétaires d'actions, de les déposer, avec telles conditions et restrictions qu'il jugera à propos, à la Caisse generale de la Compagnie, où il sera tenu par le Caissier general et de sa main un Registre secret de compte ouvert des dites actions déposées, tant pour le principal que pour les dividendes; et qu'il soit délivré par le dit Caissier general un acte du dit dépost, qui sera passé devant Notaire, contenant les conditions et restrictions stipulées par l'actionnaire qui aura fait le dépost, ausquelles le Caissier general sera tenu de se conformer.

XIX. Conformément à l'Article XVI de nos Lettres Patentes du mois d'Aoust 1717, portant le premier établissement de la Compagnie des Indes, sous le nom de Compagnie d'Occident, tous Procès qui pourroient naistre en France pour raison des affaires d'icelle, seront terminez et jugez par les Juges Consuls à Paris, dont les sentences s'executeront en dernier ressort jusqu'à la somme de Quinze cens livres et au-dessous par provision, sauf l'appel à nostre Cour de Parlement de Paris: et quant aux matieres criminelles dans lesquelles la Compagnie sera partie, soit en demandant, soit en deffendant, elles seront jugées par les Juges ordinaires. **SI DONNONS EN MANDEMENT** à nos amez et feaux Conseillers, les Gens tenans nostre Cour de Parlement, Chambre des Comptes et Cour des Aydes à Paris, que nostre present Edit ils ayent à faire lire, publier et registrer, et le contenu en iceluy garder, observer et executer selon sa forme et teneur. **CAR TEL EST NOSTRE PLAISIR.** Et afin que ce soit chose ferme et stable à toûjours, nous y avons fait mettre nostre scel. Donné à Versailles au mois de Juin, l'an de grace mil sept cens vingt-cinq, et de nostre Regne le dixième.

(Signé)

LOUIS.

Et plus bas, par le Roy. Signé **PHELYPEAUX. Visa FLEURIAU.** Vû au Conseil **DODUN.** Et scellé du grand sceau de cire verte.

Lû et publié, le Roy séant en son Lit de Justice, et enregistré, ouy et ce requerant le Procureur General du Roy, pour estre executé selon sa forme et teneur, et copies collationées d'iceluy envoyées aux Bailliages et Sénéchaussées du Ressort, pour y estre pareillement lûes, publiées et enregistrees. Enjoint aux Substituts de son Procureur

General d'y tenir la main, et d'en certifier la Cour au mois. Ce huitième Juin mil sept cens vingt-cinq.

(Signé)

MIREY.

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## TITLE X.

### DÉCLARATION DU ROI, CONCERNANT LES CONCESSIONS DANS LES COLONIES.

Louis par la grâce de Dieu, Roi de France et de Navarre: A tous ceux qui ces présentes Letters verront, SALUT. Nous avons, à l'exemple des Rois nos prédécesseurs, autorisé les Gouverneurs et Intendants de nos Colonies de l'Amérique, non seulement à faire seuls les concessions de terres que nous faisons distribuer à ceux de nos Sujets qui veulent y faire des établissements, mais aussi à procéder à la réunion à notre Domaine des terres concédées, qui se trouvent dans le cas d'y être réunies; faute d'avoir été mises en valeur; et ils connoissent pareillement, à l'exécution des Juges ordinaires, de toutes les contestations qui s'élevent entre les concessionnaires ou leurs ayant cause, tant par rapport à la validité et à l'exécution des concessions, que pour raison de leurs positions, étendues et limites, mais nous sommes informé qu'il n'y a eu jusqu'à présent rien de certain ni sur la forme de procéder, soit aux réunions des Concessions, soit à l'instruction et aux jugemens des contestations, qui naissent entre les concessionnaires ou leurs ayant cause, ni même sur les voies qu'on doit suivre pour se pourvoir contre les Ordonnances rendues par les Gouverneurs et Intendants sur cette matiere, en sorte que non seulement, il s'est introduit des usages différens dans les diverses Colonies; mais encore qu'il y a eu de fréquentes variations à cet égard dans une seule et même Colonie. C'est pour faire cesser cet état d'incertitude sur des objets si intéressants, pour la sûreté et tranquillité des familles, que nous avons résolu d'établir, par une loi précise des règles fixes et invariables, qui puissent être observées dans toutes nos Colonies, tant sur la forme de procéder à la réunion à notre Domaine des Concessions, qui devront y être réunies, et à l'instruction des discussions qu'elles pourront occasionner, que pour les voies auxquelles pourront avoir recours ceux qui croiront avoir lieu de se plaindre des Jugemens qui seront rendus. A ces causes et autres à ce nous mouvant, de l'avis de notre Conseil, et de notre certaine science, pleine puissance et autorité Royale, nous avons dit, déclaré et ordonné et par ces présentes, signées de notre main, disons déclarons et ordonnons, voulons et nous plaît ce qui suit:

I. Les Gouverneurs, Lieutenants Généraux pour nous et les Intendants de nos Colonies, ou les Officiers qui les représenteront à leur défaut, ou en leur absence des Colonies, continueront de faire con-

jointement les Concessions des terres aux habitants qui seront dans le cas d'en obtenir pour les faire valoir, et leur en expédieront les titres, aux clauses et conditions ordinaires et accoutumées.

II. Ils procéderont pareillement à la réunion à notre Domaine des terres, qui devront y être réunies, et ce, à la diligence de nos Procureurs des Jurisdictions ordinaires, dans le ressort desquelles seront situées les dites terres.

III. Ils ne pourront concéder les terres qui auront été une fois concédées, quoiqu'elles soient dans le cas d'être réunies, qu'après que la réunion en aura été prononcée, à peine de nullité des nouvelles Concessions, et sans prejudice néanmoins de la réunion laquelle pourra toujours être poursuivie contre les premiers concessionnaires.

IV. Les Gouverneurs et Lieutenants-Gouverneurs pour nous et les Intendants, ou les Officiers qui les représenteront à leur défaut, ou en leur absence des Colonies, continueront aussi de connoître, à l'exclusion de tous autres Juges, de toutes contestations qui naîtront entre les Concessionnaires ou leurs ayant cause, tant sur la validité et exécution des Concessions, qu'au sujet de leurs positions, étendues et limites, et dans le cas où il y aura des Mineurs qui seront parties dans les dites contestations, elles seront communiquées à nos Procureurs des Jurisdictions ordinaires, dans le ressort desquelles les Gouverneurs et Intendants feront leur résidence, pour y donner leurs conclusions de la même manière, que si les dites contestations étoient portées aux dites Jurisdictions, n'entendons néanmoins comprendre dans la disposition du présent article, les contestations qui naîtront sur les partages de familles, dont les Juges de nos Jurisdictions ordinaires continueront de connoître.

V. Declarons nulles et de nul effet, toutes Concessions qui ne seront pas faites conjointement par le Gouverneur et l'Intendant, ou par les Officiers qui doivent les représenter respectivement, comme aussi toutes réunions qui ne seront pas prononcées, et tous Jugemens qui ne seront pas rendus en commun par eux ou leurs représentants. Autorisons néanmoins l'un des deux, dans le cas de décès de l'autre, ou de son absence de la Colonie et de défaut d'Officiers qui puissent représenter celui qui sera mort ou absent, à faire seul les Concessions, même à procéder aux réunions à notre Domaine, et aux Jugemens des contestations formées entre les Concessionnaires, en appelant cependant, pour les Jugemens des dites contestations, seulement tels Officiers des Conseils Supérieurs ou des Jurisdictions qu'il jugera à propos; et il sera tenu de faire mention tant dans les concessions et réunions, que dans les Jugemens des contestations particulieres, de la nécessité où il se sera trouvé d'y procéder ainsi; et ce à peine de nullité.

VI. Dans les cas où les Gouverneurs et Intendants se trouveront d'avis différens sur les demandes qui leur seront faites de Concessions de terres, voulons qu'ils suspendent d'en expédier les titres, jusqu'à ce que nous leur ayons donné nos ordres, sur le compte qu'ils nous rendront de leurs motifs, et dans les cas de partage d'opinions entr'-

eux, soit pour les Jugemens de réunion soit pour ceux des contestations d'entre les propriétaires de concessions, ils seront tenus d'y appeller le Doyen du Conseil Supérieur, ou en cas d'absence ou d'empêchement légitime, le Conseiller qui le suit, selon l'ordre du Tableau, le tout sans préjudice de la prépondérance de la voix des Gouverneurs dans les affaires concernant notre service, où elle doit avoir lieu.

VII. Dans les affaires où il écherra d'ordonner des descentes sur les lieux et des nominations et rapports d'experts, ou de faire des Enquêtes, les dispositions prescrites à cet égard, par les titres vingt-un et vingt-deux de l'Ordonnance de mil six cent soixante-sept, seront observées à peine de nullité.

VIII. Pourront les parties se pourvoir par appel en notre Conseil, contre les Jugemens qui seront rendus par les Gouverneurs et Intendants, tant sur les dites contestations particulières, que par les réunions à notre Domaine. Les dits Appels pourront être interjetés par de simples actes, et les Requêtes qui seront présentées en conséquence seront remis avec les productions des parties ès mains du Secrétaire d'Etat, ayant le département de la Marine, pour sur le rapport qui en sera par lui fait en notre Conseil, être par nous statué ce qu'il appartiendra.

Si donnons en mandement à nos amés et féaux les gens tenant notre Conseil Supérieur de *Canada*, que ces présentes ils aient à faire lire, publier et régistrer, et le contenu en icelles garder, observer et exécuter selon leur forme et teneur, nonobstant tous Edits, Déclarations, Arrêts et Ordonnances, Règlements et autres choses à ce contraires, auxquels nous avons dérogé et dérogeons par ces présentes; car tel est notre plaisir. En témoin de quoi nous y avons faite mettre notre Scel. Donné à *Versailles*, le dixseptième jour du mois de Juillet, l'an de grâce, mil sept cent quarante-trois, et de notre Règne le vingt-huitième.

(Signé)

LOUIS.

Et plus bas, par le Roi,

(Signé)

PHELIPPEAUX.

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## TITLE XI.

DECLARATION DU ROI EN INTERPRÉTATION DE CELLE DU 17 JUILLET, 1743,  
CONCERNANT LES CONCESSIONS DES TERRES DANS LES COLONIES.

LOUIS par la grâce de Dieu, Roi de *France* et de *Navarre*: à tous ceux qui ces présentes lettres verront, SALUT: Par notre Déclaration du dixsept Juillet, mil sept cent quarante trois, nous avons réglé la forme de procéder, soit aux concessions des terres dans nos Colonies françoises, soit à la réunion à notre Domaine des terres concédées qui

se trouvent dans le cas d'y être réunies, soit à l'instruction et au jugement des contestations qui naissent entre les concessionnaires ou leurs ayant cause; et par l'article huit de la même déclaration, nous avons ordonné que les Parties pourront se pourvoir par appel en notre Conseil, contre les Jugemens qui seront rendus par les Sieurs Gouverneurs et Intendans des dites Colonies, sur toutes ces matières, dont la compétence leur est dévolue à l'exclusion de tous autres Juges, que les dits appels pourront être interjetés par de simples actes, et que les requêtes, qui seront présentées en conséquence, seront remises avec les productions des parties ès mains de notre Secrétaire d'Etat, ayant le département de la marine, pour, sur le rapport qui en sera par lui fait en notre Conseil, être par nous statué ce qu'il appartiendra. Mais il nous a été représenté sur ce dernier article, qu'à cause de l'éloignement des lieux, il conviendrait, pour le bien de la justice, de rendre exécutoire, par provision, les Jugemens rendus sur les dites matières par les dites Sieurs Gouverneurs et Intendans, et que cette nouvelle disposition empêcheroit beaucoup d'appels, que les parties condamnées n'interjettent que pour se maintenir dans leurs injustes possessions. A ces causes et autres à ce nous mouvant, de l'avis de notre Conseil et de notre certaine science, pleine puissance et autorité royale, nous, en interpretant notre déclaration, du dixsept Juillet mil sept cent quarante trois, avons dit, déclaré et ordonné, et par ces présentes, signées de notre main, disons, déclarons et ordonnons, voulons et nous plait, que les Jugemens, qui seront rendus en conséquence de notre déclaration, par les Gouverneurs nos Lieutenans Généraux et les Intendans en nos Colonies ou par les Officiers qui les représenteront sur les dites matières, dont la connoissance leur est attribuée privativement à tous autres Juges, soient exécutoires par provision, et nonobstant l'appel qui pourra en être interjeté, et sans préjudice d'icelui. Laissons néanmoins à la prudence des dits Gouverneurs et Intendans, dans les cas où ils le jugeront à propos, de n'ordonner l'exécution provisoire de leurs jugemens, qu'à la charge de donner bonne et suffisante caution par la partie en faveur de laquelle ils auront été rendus. Et sera au surplus notre dite déclaration exécutée suivant sa forme et teneur. Si donnons en mandement à nos amés et féaux les gens tenant notre Conseil Supérieur de *Québec*, que ces présentes ils aient à faire lire, publier et régistrer et le contenu en icelles garder, observer et exécuter selon leur forme et teneur, nonobstant tous Edits, Déclarations, Arrêts, Ordonnances, Réglemens et autres choses à ce contraires, auxquels nous avons dérogé et dérogeons par ces présentes; car tel est notre plaisir. En témoin de quoi nous y avons fait mettre notre Scel. Donné à *Versailles*, le premier jour du mois d'Octobre, l'an de grâce mil sept cent quarante sept, et de notre Règne le trente troisième.

(Signé)

LOUIS.

Et plus bas, par le Roi,

(Signé)

PHELLIPEAUX, avec paraphe.

Et scellé du grand Sceau en cire jaune.

## NOTE.

The Compiler does not deem an apology necessary for adding, in an Appendix, the discourse of one of the most learned and eloquent advocates of the United States, upon the life and services of a Judge universally esteemed and lamented in Louisiana. The discourse itself is in detail a compendious history of the civil law of the state, of whose judiciary the subject of it was a distinguished ornament.

He has added, with more diffidence, a short exposition of the titles of the ancient French inhabitants.

# APPENDIX.

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No. I.

## PANEGYRIQUE

DE

L'HONORABLE GEORGE MATHEWS,

PRÉSIDENT DE LA COUR SUPRÊME DE L'ÉTAT DE LA LOUISIANE,

Prononcé le    Janvier 1837,

PAR

ETIENNE MAZUREAU,

AVOCAT GÉNÉRAL ET DOYEN DU BARREAU,

*En vertu d'une Résolution adoptée à la Nouvelle-Orléans par ses confrères assemblés le 16 Novembre, 1836.*

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### MESSIEURS ET ESTIMABLES CONFRÈRES :

CHEZ nos ayeux Européens, il n'y a pas très long tems encore qu'à la mort du prince, ou des grands que le "droit de naissance" plaçait à la tête des peuples, un usage antique voulait, lors même que l'histoire, fidèle à sa mission, leur burinait des pages peu faites pour les recommander au respect des générations futures, que les plus grands orateurs les représentassent, dans des panégyriques de la plus haute éloquence, sous les traits de demi-dieux qui n'avaient marqué leur trop court passage sur la terre que par des actions héroïques ou par des bienfaits dignes de l'admiration et de la reconnaissance des hommes. Là le simple magistrat préposé à l'administration de la justice, quels que fussent les droits qu'il avait acquis à l'estime et à l'amour de ses contemporains; quels que beaux et sublimes exemples qu'il eût laissés à suivre pour le bonheur des sociétés, ne pouvait descendre au tombeau qu'ignoré ou inaperçu de ceux qui n'habitaient pas le lieu circonscrit où il avait exercé ses augustes fonctions. L'usage ne permettait pas que la renommée publiât ailleurs ses vertus ou ses services, ni qu'il fût le sujet d'un discours funèbre destiné à en perpétuer le souvenir. Considéré comme la créature ou l'instrument du prince ou d'un seigneur haut-justicier, il n'avait aucun mérite éclatant qui lui fût propre: c'était à ceux-ci que s'attribuaient l'amour et le



respect qu'il avait su inspirer pour la justice et pour les lois, ainsi que l'union et la concorde que sa sagesse avait fait régner dans son pays. Ces maîtres des peuples étaient les héritiers de sa gloire. Ils recueillaient comme un tribut légitime les éloges et les hommages qui n'étaient dûs qu'à ses vertus et à sa conduite exemplaire.

Chez nous, Messieurs, il n'en est heureusement point ainsi. Chez nous les vertus et les vices, les bonnes et les mauvaises actions des individus, quels qu'ils soient, leur sont entièrement personnels: le mérite ou le blâme leur en appartient exclusivement. Le plus haut placé dans l'exercice du pouvoir n'est et ne peut être, aux yeux de la société entière, qu'une simple créature de la loi, qu'un mandataire comptable de tous ses actes envers le peuple son souverain, source unique de toute autorité, de tout pouvoir légitime. Nous l'honorons quand il s'est rendu digne de louanges: Il est consigné à l'oubli lors qu'il n'a pas justifié la confiance dont il avait été investi: Et les mérites, les services et les vertus d'aucun autre fonctionnaire ne sauraient le faire vivre lui-même dans notre mémoire, ni lui servir de passeport vers la postérité.

Aussi, Messieurs et confrères, pouvons-nous dire sans hyperbole que l'assemblée que vous composez en ce moment a quelque chose de vraiment édifiant, si nous la comparons à ces pompeuses cérémonies, à ces brillans concours obligés de courtisans superbes, où pour, me servir des expressions d'un écrivain célèbre, "Un orateur que personne ne croyait venait parler de vertus qu'il ne croyait pas d'avantage, tâchait de se passionner un instant pour ce qui était quelquefois l'objet du mépris public et le sien, et entassant avec harmonie des mensonges mercenaires, flattait longuement les morts pour être loué lui-même ou récompensé par les vivans."\*

Réunis dans cette enceinte par votre seule volonté, vous n'avez qu'un désir; c'est de rendre un juste hommage à la vérité; c'est d'acquitter autant qu'il est en vous de le faire, une dette sacrée, en honorant la mémoire d'un bon citoyen qui a servi votre pays avec zèle, que vous avez tous connu, que vous avez tous été en position de bien apprécier; qui, en remplissant au milieu de vous, les devoirs épineux, les fonctions délicates de la magistrature, pendant un tiers de siècle fécond en évènements dont l'influence s'est fortement fait sentir, sur les hommes, leurs mœurs et leurs fortunes, a dû nécessairement mécontenter plus d'un plaideur, froisser l'amour propre et frustrer les espérances de plusieurs d'entre nous, et qui a cependant emporté dans la tombe notre estime et l'estime et les justes regrets de tous les honnêtes gens, de tous les bons citoyens.

Il ne vous manque ici, Messieurs, pour bien remplir vos vues, qu'une bouche assez éloquente pour célébrer convenablement les hautes qualités et le rare mérite de ce vertueux magistrat, ainsi que les importans services qu'il a rendus à l'Etat

Daignez, en entendant ces dernières paroles, ne pas m'accuser de

\* Thomas. Essai sur les éloges.

l'intention puérile de cacher sous le voile d'une feinte modestie, une confiance que, plus jeune, j'aurais pû avoir dans mes propres forces. Arrivé à mon douzième lustre, après avoir consommé près des deux tiers de ma laborieuse existence dans la poursuite ou la défense de droits litigieux rarement susceptibles d'inspirer de beaux mouvemens oratoires, et souvent capables de glacer l'imagination la plus poétique, je ne saurais, en vérité, avoir la faiblesse de me croire, soit les talens, soit le genre d'éloquence nécessaires pour m'acquitter avec honneur du panégyrique d'un homme illustre.

Je le sentais, Messieurs et confrères, lorsque (probablement afin de me donner une marque de déférence comme votre doyen) vous me désignâtes pour être l'un des organes de vos sentimens—envers l'excellent Judge dont nous déplorerons la perte: et, vous vous en souvenez encore, ce ne fut qu'après beaucoup d'hésitation que je me décidai à accepter cette tâche honorable qui effrayait ma faiblesse, mais audevant de laquelle on m'aurait vu courir, si elle eût été moins imposante ou plus analogue aux talens que je puis avoir reçus de la nature, ou à ceux que j'ai en l'occasion de cultiver dans l'exercice de notre profession.

Je le sens encore en ce moment, Messieurs; et, quels que disposés que vous puissiez être à me traiter avec indulgence, je ne vous-dis-simulerai point que les inquiétudes de mon amour propre sont loin d'être dissipées. Mais, témoin de la manière distinguée dont notre honorable George Mathews a, pendant trente ans, rempli tous les devoirs de sa place; ainsi que des nombreuses vicissitudes que, dans cette longue période, notre législation civile a subies; observateur attentif et souvent alarmé des écueils que l'amour des innovations semait continuellement sous ses pas et sous ceux de ses estimables collègues; pénétré, comme je le suis, des services importans dont notre Louisiane est redevable à sa rare impartialité, à son excellente judiciaire, à son zèle soutenu pour la justice; si j'ai dû ne pas songer à vous faire entendre un de ces discours brillans qui charment par les grâces du style et la richesse de l'élocution, un de ces panégyriques conformes aux règles du genre, dans lesquels la chaleureuse et féconde imagination de l'orateur exerce, deploye noblement ses trésors, dans l'intérêt de sa propre gloire autant que dans l'intérêt de la gloire de son héros; je manquerais de sincérité, si je ne vous avouais pas que, simple narrateur, j'ai l'espoir de vous intéresser en vous rappelant quelques uns des titres que ce magistrat justement regretté a constamment su se faire, par sa conduite et par ses doctrines, au respect et à la reconnaissance de tout bon citoyen Louisianai.

Puissent, au surplus, Messieurs, les réflexions qui jailliront des faits que je vais tâcher de grouper, et de quelques vérités que plusieurs d'entre vous vont entendre pour la première fois, peut-être, avoir le double effet de stimuler les belles âmes qui se sentent disposées à marcher sur les traces de cet illustre fonctionnaire public, et d'exciter quelques employés de l'Etat qui, je le crains, n'ont que de l'insouciance pour ce qui n'est pas une récompense tangible de leurs services, à faire

quelques efforts, afin d'échapper soit à la censure de leurs contemporains, soit à la flétrissure du silence réprobateur de la postérité. Tel est le seul vœu que je fais en ce moment, et s'il peut n'être pas stérile, je croirai n'avoir pas trop mal rempli la tâche qu'il vous a plu de m'assigner.

L'honorable George Mathews devait le jour à d'honnêtes et respectables parens qui habitaient la Virginie, devenue depuis si justement célèbre par la brillante constellation de grands-hommes qu'elle a fournis à la République.

Sa mère, enceinte de quelques mois lors de la mémorable expédition qui se termina par la bataille de l'embouchure de la grande Kanawah, le mit au monde le 30 Septembre 1774, dans le comté d'Augusta, pendant que son père, qui était du nombre des braves qui composaient cette expédition, exposait sa vie pour la défense de son pays, et commençait à se faire remarquer par un courage rare, une présence d'esprit admirable, une justesse de coup d'œil surprenante, qui ne tardèrent pas à lui faire attribuer, par ses compagnons d'armes, le principal mérite et, en quelque sorte, toute la gloire de cette belle journée—journée fameuse, qui vit ce que peut, contre des hordes sauvages qui ne savent que détruire pour vivre, qui n'ont d'autre jouissance que le carnage; la valeur heroïque de l'homme civilisé qui se bat pour protéger une famille qui lui est chère et conserver un champ que ses mains cultivent.

Depuis le moment de sa naissance jusqu'à l'âge de dix ans, sa mère, que l'on aimait à distinguer, entre ses vertueuses compatriotes, par la supériorité de son esprit, l'excellence de son jugement et les plus aimables qualités du cœur, eût seule tout le soin de son éducation. Constamment au service de sa patrie, pendant la majeure partie de ce tems, son père qui n'avait que rarement le bonheur de le presser contre son sein, se reposait de ce soin, avec toute confiance, sur cette épouse bien aimée; convaincu qu'elle ne pourrait manquer de donner à leur fils chéri, des leçons capables d'en faire un jour un homme utile à leur pays. Et, à quelles mains plus sûres, un bon père pouvait-il penser à remettre la tâche de faire germer, dans le cœur du jeune enfant de son chaste amour, des principes d'honneur et de vertu? Les femmes ne possèdent-elles pas à un très haut degré le grand art d'inspirer de bonne heure le goût des plus grandes et des plus nobles choses?

Privé des leçons et des exemples de son excellent père, que la mort lui ravit, dès l'âge de dix ou onze ans, l'immortel Washington ne fut-il pas élevé par la femme qui l'avait porté dans son chaste sein? n'est-ce pas aux tendres soins, à la constante sollicitude de ce modèle des mères qu'il fut redevable des beaux sentimens, des vertus austères et patriotiques qui le distinguèrent dans toutes les circonstances de sa noble vie, et lui imprimèrent l'ineffaçable caractère de vraie grandeur et de suprême bonté, qui l'a fait proclamer: "Le premier dans la guerre, le premier dans la paix, et le premier dans le cœur de ses concitoyens?"

Que d'hommes ont figuré avec éclat sur la vaste scène du monde, qui, probablement, auraient vécu et seraient morts ignorés, s'ils n'avaient eu pour Mentor de leur jeunesse ce sexe digne de tous nos respects comme de nos plus douces affections, qui réunit à l'exquise sensibilité du cœur, les charmes irresistibles de la beauté, à la vivacité de l'esprit, le sentiment profond des convenances; et que, sans doute, "l'éternel n'a créé après le nôtre, que parceque sa sagesse infinie réservait son plus intéressant ouvrage pour couronner et embellir tout la nature!"

En 1785 Mr. George Mathews père quitta la Virginie, avec toute sa famille, pour aller fixer sa résidence en Georgie, dans le Comté qui portait alors le nom de Wilkes et qui, depuis, a pris celui de Oglethorpe.

Le fils n'était, à cette époque, âgé que de onze ans. Le lieu où il demeura, jusqu'en 1792, n'offrait, comme les autres pays frontières, que très peu de ressources pour l'instruction de la jeunesse. Ses parens l'y envoyèrent pourtant aux écoles qui y étaient ouvertes, et il y continua, sous leurs yeux, les études aux quelles sa respectable mère l'avait préparé et qu'elle ne cessa point de surveiller.

De retour, dans la Virginie, il fût placé en 1794 dans une Académie, connue sous le nom de Liberty Hall, dans la ville de Lexington, comté de Rock-Bridge, où, dans le cours de l'année suivante, il termina ses études classiques, sous les meilleurs professeurs du tems; et, en 1796, il alla rejoindre sa famille dans la Georgie.

L'accueil qu'il reçut de ses excellens parens, dont le cœur s'épanouit de joie en le revoyant, fut tel que pouvait le désirer un fils aimant et respectueux qui avait, jusque là, répondu à toutes leurs espérances. Sensible et prévenant, son seul désir et son seul bonheur étaient de mériter par une conduite sage, et par des procédés aussi délicats que tendres, l'amour dont ils ne cessaient de lui donner des preuves: et leurs volontés étaient autant de lois qu'il s'empressait toujours d'accomplir.

Il s'était de bonne heure senti un penchant décidé pour l'étude des sciences médicales. L'exquise bonté de son cœur lui persuadait que, dans la belle profession de médecin, il pourrait, plus que dans aucune autre, devenir vraiment utile à l'humanité; mais son respectable père, qui jugeait d'après l'extrême sagacité, et la solide logique dont il faisait preuve en toutes circonstances, qu'il se trompait sur sa véritable vocation, insista pour qu'il tournât ses vues vers le Barreau, et le détermina à se livrer à l'étude du droit.

Sans cet incident remarquable, quoique simple en lui-même, les Etats Unis auraient probablement compté George Mathews fils, au nombre de leurs médecins les plus célèbres; car ce digne citoyen, cet estimable magistrat, n'a jamais cessé, au milieu de ses nombreux travaux, de montrer un goût particulier pour l'art de guérir, et une aptitude réelle à l'exercer avec succès. Mais si, suivant son propre penchant, il se fût fait médecin, la Louisiane n'aurait pas eu l'avantage de posséder en lui un de ses meilleurs juges.

Ce fut donc en se conformant aux desirs de son père qu'en 1796, il

commença, sous John Mathews, son frère aîné, l'étude des lois, et deux ans après il se rendit à Augusta, où, sous la direction de George Walker, l'un des légistes les plus éminens de la Georgie, il continua ses études légales.

Telle fut l'ardeur qu'il y mit, et la facilité avec laquelle sa rare intelligence sut en surmonter les difficultés, qu'en 1799 il fut admis au Barreau et, en peu de tems, s'y fit estimer par son savoir autant que par la douceur de ses mœurs, et la pureté de ses principes.

Ce fut là qu'en 1805, exclusivement occupé des soins de sa profession, il fut distingué par l'illustre Thomas Jefferson qui le nomma, sans qu'il s'y attendît, Judge de la Cour Supérieure du Territoire du Mississippi. Un tel hommage, rendu par un tel homme, aux vertus et aux lumières d'un jeune légiste, est, sans contredit, le plus bel éloge qu'on puisse en faire.

C'était un beau tems, Messieurs, que celui où les emplois de la magistrature s'offraient ainsi au mérite! Il y en avait alors bien plus à remplir que d'infatigables solliciteurs à pourvoir. Si les lumières n'avaient pas fait tous les progrès dont notre brillante époque se glorifie, on apprenait, on étudiait long tems afin de bien savoir; après avoir appris on n'était que plus modeste; on se gardait de trancher, de faire le docte; on se défiait de soi-même; on redoutait la responsabilité. D'un autre côté, on était moins opulent, et le fils ne rougissait pas de prendre et d'exercer l'utile métier de son estimable père. L'or et le pouvoir ne dispensaient pas de tous les mérites, n'enflammaient pas toutes les ambitions; mais étions-nous moins heureux, moins estimables, moins libres, moins républicains?

A cette même époque et depuis la fin de 1804, le territoire d'Orléans était organisé. Il avait pour charte l'ordonnance de 1787 faite pour le territoire situé au nord-ouest de l'Ohio. En vertu de cette ordonnance, qui mettait fin à la dictature d'un gouverneur Américain, provisionnement revêtu des pouvoirs d'un capitaine général de colonie Espagnole, et qui s'était bravement érigé en législateur.\* Un tribunal décoré du titre de Cour Supérieure, était établi à la Nouvelle Orléans. Un seul juge, au lieu de trois qui devaient le composer, y rendait la justice. Ce juge était l'honorable John B. Prevost, magistrat aussi recommandable par ses lumières que séduisant par la beauté de sa personne et ses mœurs douces et polies, qui, jusqu'en 1806, sut remplir à la satisfaction du Barreau et de la société entière, les nombreuses et difficiles fonctions de juge civil et criminel en premier et dernier ressort. Cet homme, justement respecté, tant qu'il habita notre pays, est mort quelques années après, en remplissant une mission diplomatique dans l'Amérique Méridionale, auprès d'un peuple qui se disait chrétien, parcequ'il avait été baptisé, et républicain, parcequ'il avait

\* William C. C. Claiborne, envoyé ici avec ces pouvoirs immenses, ne se borna pas à administrer selon les lois, en conséquence de ces pouvoirs qu'il connaissait fort peu ou point de tout. Il fit, sous le titre d'ordonnances, des lois par lesquelles il créa d'abord une Cour de Common pleas, puis la Banque de la Louisiane. Jamais un capitaine général n'aurait songé à exercer ainsi la puissance souveraine. N'en accousons pas cet honnête homme. Il allait trop loin, mais quel est le navigateur qui, jetté sur l'océan sans boussole, sans cartes, sans instrumens, conduira sa barque au port sans accident?

brisé les liens qui l'assujétissaient naguère à l'antique Espagne; mais qui était aussi incapable de comprendre et de pratiquer les divins préceptes de charité enseignés par l'Evangile, qu'il l'est encore aujourd'hui de se gouverner par les principes d'une sage liberté. Ah! si des sublimes régions où l'Eternel a son trône, John B. Prevost, ce magistrat estimable à qui la Louisiane doit, à plus d'un titre beaucoup de reconnaissance, peut entendre mes faibles paroles, il me rendra sans doute la justice de penser, que s'il ne dépendait que de moi de venger l'outrage fait à sa dépouille terrestre, par les fanatiques au milieu desquels il a exhalé son dernier soupir, leurs noms odieux passeraient à la postérité, flétris et exécrés. Les barbares! refuser la sépulture à un homme! à un chrétien, à un représentant d'une nation amie, parcequ'il n'adorait pas l'Eternel de la même manière qu'eux!!!

L'honorable George Mathews exerça la place de juge de Territoire du Mississippi jusqu'à l'année 1806.

Il serait difficile de nier les titres qu'il sut s'y faire à l'estime et à la confiance publique, lorsqu'on se rappelle qu'il ne quitta cette place que pour venir, en vertu d'une nouvelle commission du même Président Jefferson, en occuper une autre sur notre siège, à côté de John B. Prevost qu'en restait le Président, et de William Sprigg qui venait de s'y asseoir.

Il arriva parmi nous en Mai, 1806, et le 19 de ce mois, après avoir prêté son serment d'office, prit possession de sa place, en présence d'un nombreux auditoire, dont la physionomie exprimait la confiance que son air franc et ouvert inspirait.

Dirai-je que, quelque satisfait que le peuple fût de la sagesse qui avait présidé aux décisions de notre Cour Supérieure, chacun paraissait encore plus rassuré pour l'avenir? Ce sentiment ne fut dissimulé par personne, quoique l'on confessât généralement que la conduite de l'honorable John B. Prevost avait prouvé que l'axiome: "Juge unique, Juge inique," tiré de ce qui avait été observé chez des peuples autrement gouvernés que nous, manquait de vérité, dans un pays tel que le nôtre, régi par des lois écrites, doté de la belle institution du juri, et placé sous la sauvegarde de la publicité.

Je ne saurais taire non plus que, bien que le maintien et l'extérieur des juges qui, jusqu'alors, avaient occupé le siège, eussent toujours été fort respectables, les citoyens trouvaient que la présence de l'honorable George Mathews donnait encore un aspect plus imposant à la cour. Or cette opinion devenait en quelque sorte une nouvelle garantie pour l'ordre public, comme une nouvelle source de confiance et de sécurité pour les plaideurs. Tel est l'homme de tous les pays que ce qui plait d'abord à ses yeux, produit presque toujours une impression favorable sur son esprit; et qu'il associe naturellement des idées de probité et de délicatesse à tout ce qui respire la propriété, la décence et la dignité. L'observation nous enseigne que l'homme public qui néglige son extérieur et son maintien, compromet souvent, par cela seul, la considération dont il est utile qu'il soit entouré: Elle

nous montre même qu'il ne lui suffit pas d'une grande réputation de talens, de lumières et d'intégrité, pour compenser cette faute ou se la faire pardonner. — Ce n'est que le petit nombre qui, en tous lieux, s'abstient de juger l'arbre autrement que par ses fruits: Les masses, toujours moins sages ou moins éclairées, s'arrêtent partout à l'écorce.

A peine arrivé parmi nous, l'honorable George Mathews, aussi pénétré que qui que ce fût de la sainteté de ses devoirs, découvrit toute la difficulté de la tâche qu'il avait à remplir. Bien qu'il eût fait ses humanités, que conséquemment la langue de Justinien ne lui fût pas étrangère; qu'il eût fait son droit et que la science du juste et de l'injuste eût en lui un adepte éprouvé; il sentit que le Français, que parlaient tous les Louisianais, que l'Espagnol, dans lequel étaient écrites presque toutes les lois civiles du pays, exigeaient qu'il se livrât à des études nouvelles.

Telle fut à ce sujet, sa prompte détermination; telle fut surtout son admirable aptitude à apprendre, qu'en très peu de tems son oreille devint familière avec le Français et l'Espagnol, au point de pouvoir dispenser les avocats qui n'avaient pas une connaissance suffisante de sa propre langue, de la peine souvent infructueuse de chercher à en faire usage pour plaider devant lui: "Parlez Français—lisez vos auteurs en Espagnol" disait-il, "Je vous entendrai."—Or, vous sentez, Messieurs, tout ce que ces paroles avaient d'encourageant; comme elles retentissaient agréablement dans les cœurs de ceux auxquels elles étaient adressées! Vous concevez aussi quelles flatteuses espérances les Louisianais puisaient dans une telle preuve de dévouement à leurs intérêts, de la part d'un juge qu'ils savaient étranger à leurs mœurs, à leurs usages, à leurs lois; et que peut-être, au milieu des perplexités où ils se trouvaient naturellement, après deux rapides changemens de domination, opérés sans leur consentement, ils envisageaient comme un instrument au moyen duquel on parviendrait à les rendre nuls sur la terre natale, découverte et défrichée par leurs ayeux.

Ce ne fut pas seulement à l'étude des langues qu'il consacra ses veilles; celle de nos lois fut surtout l'objet de son attention constante. Ses progrès y furent également remarquables; et tous les préjugés qu'il avait pu apporter ici, contre le droit Romain et les codes Espagnols, avaient rapidement fait place à une juste admiration. "The more I read the Roman laws, the more I am convinced that the name of written reason, given them by the learned and the wise, is the best definition that they could give of them." Telle était sa manière de s'exprimer; et, dans la bouche d'un homme doué d'un jugement aussi sain, ces paroles avaient assurément beaucoup de poids. Ces paroles, il ne les a jamais démenties jusqu'à sa mort, si quelqu'un a toujours sincèrement déploré notre constante disposition à innover, c'est assurément l'honorable George Mathews.

Et comment aurait-il pu penser ou agir autrement? Les lois civiles, (et sous ce nom je ne veux pas comprendre les lois arbitraires qui peuvent n'avoir qu'un mérite relatif, et varier selon la forme du gouvernement, l'organisation des tribunaux, les mœurs, ou les usages

des peuples,) les lois civiles, qui nous donnent les règles des contrats, des conventions, des obligations, ne sont autre chose que les règles du bon sens adoptées par cette raison perfectionnée que nous appelons *justice*. S'il fallait en donner la preuve, je dirais: Lisez et méditez le Traité des obligations de Pothier. Cet excellent traité où sont classés dans un ordre parfait, les principes du droit Romain sur ces matières immenses, est en même tems, le meilleur code de morale pratique qu'un homme puisse étudier. Aussi, comme l'a noblement proclamé un savant légiste Anglais, ses règles sont elles suivies comme des lois, à Westminster aussi bien qu'à Orléans. Ajoutons, Messieurs, que cet immortel ouvrage, dont la première traduction, en langue Anglaise, fut faite par l'un des plus savans magistrats de notre pays,\* fait autorité chez presque tous les peuples vraiment éclairés de la terre, qui, en se l'appropriant, ont rendu un bien juste hommage au mérite de l'auteur ainsi qu'à la sagesse des lois Romaines.

Dire que l'honorable George Mathews s'est toujours singulièrement distingué par la solidité de ses jugemens, serait, peut-être, s'exprimer avec trop de partialité pour lui et pas assez de justice pour ses collègues. Mais, de même qu'il aimait à payer, aux belles qualités qui leur étaient propres, le tribut d'éloges qu'elles méritaient; ceux-là n'ont jamais cessé de lui donner les témoignages les plus honorables; combien de fois ne les avons-nous pas entendu déclarer que personne n'était doué de plus de sagacité? Combien de fois n'ont-ils pas dit que, dans leurs délibérations, il les étonnait toujours par l'extrême facilité avec laquelle il savait apprécier les vrais mérites d'une contestation, et débarrasser le point important à examiner de toutes les questions incidentes dont l'erreur ou le génie de la cavillation étaient parvenus à l'envelopper? Et quelle preuve plus satisfaisante pourrait-on exiger de la pénétration de son esprit, de l'excellence de sa judiciaire, de la solidité de ses principes, et de son invariable amour pour la justice, que les sentences qu'il redigeait? N'y avons-nous pas sans cesse remarqué que, plus jaloux de parler en juge que de faire des discours d'apparat, de décider une question que de montrer qu'il avait les talens nécessaires pour la bien développer; dédaignant tout ambitieux étalage de science, comme toutes les vaines subtilités où l'esprit brille souvent aux dépens de la saine raison; s'attachant enfin constamment à la substance beaucoup plus qu'à la forme, ses décisions, sans jamais heurter, les dispositions textuelles de la loi, étaient toujours empreintes du sceau de l'équité? N'hésitons pas, Messieurs, à lui rendre ce témoignage. C'est principalement par son zèle pour ce qui était vraiment juste et équitable qu'il s'est fait remarquer sur le siège, depuis le premier jour où il s'y est assis, jusqu'à l'époque mémorable où, pensant que notre éducation républicaine était assez avancée, les arbitres de nos destinées politiques crurent pouvoir nous affranchir de la tutelle territoriale et remplir libéralement les conditions du traité de cession en nous admettant dans l'Union, moyennant

\* L'honorable François Xavier Martin.



l'abandon de tous nos droits à nos terres vacantes! C'est par ce même zèle, toujours soutenu, qu'il a mérité notre estime et notre confiance depuis l'organisation de notre Cour Suprême jusqu'au moment où la mort nous l'enleva et plongea sa respectable famille dans la désolation et le deuil.

La nature, qui avait fait de George Mathews un homme essentiellement juste, l'avait encore doué de beaucoup d'esprit, d'une gaîté de caractère peu commune et d'un grand fond de sensibilité. Dans la société intime, il savait, sans paraître s'en douter, répandre un charme tout particulier sur les entretiens les plus indifférens, par une foule de saillies originales de pensées neuves, de reparties fines et de traits piquans qui stimulaient sans blesser. Sur le siège, quoiqu'il fût généralement assez grave, on le voyait souvent, d'un seul bon mot vu d'une seule observation plaisante, faire prendre aux plaidoiries les plus fatigantes par leur sécheresse et leur aridité, des formes vives, enjouées, gracieuses, qui, loin de nuire à la marche des débats ou au développement des questions agitées, y jetaient en quelque sorte une lumière nouvelle et les facilitaient en delassant l'esprit. Si je ne craignais pas, en particularisant, de ranimer, chez des personnes dignes de tous nos égards, des souvenirs douloureux, je ne me bornerais pas à dire que, dans les causes criminelles, une situation attendrissante, habilement amenée par un éloquent défenseur, n'a jamais manqué de l'émuvoir profondément: je dirais en quelles circonstances j'ai vu d'abondantes larmes inonder son visage, pendant que certains orateurs possédant l'art d'exciter les plus vives et les plus douces émotions du cœur, faisaient d'heureux efforts pour inspirer de nobles et tendres sympathies en faveur d'intéressans pères de famille assez infortunés pour se trouver placés sous le coup d'accusations capitales. Mais je dirai que je l'ai vu sanglotter, suffoquer même, en prononçant la terrible sentence de la loi à des accusés convaincus? Oh! celui là, pour être juge, n'avait pas oublié qu'il était homme; et l'on peut, en toute sûreté, avancer que "rien de ce qui affectait l'humanité ne lui était étranger!"—Et que l'on ne pense pas que sa vive sensibilité nuisît à la fermeté de son âme. Il existe sans doute ici plus d'une personne ayant observé comme moi à quel point il savait allier l'une à l'autre; et concilier ainsi certains égards, certaines bienséances avec la dignité de sa place et le sentiment profond de ses devoirs.

A une époque mémorable où nous vîmes, au milieu de la paix, la constitution des Etats Unis, notre charte, nos lois et la liberté individuelle audacieusement violées par un chef militaire, soldat de la révolution; ce chef, dont la renommée s'était autrefois, et s'est depuis diversement occupée, eut à comparaître devant notre cour supérieure, en vertu d'un mandat "d'habeas corpus," lancé contre lui; afin qu'il rendît compte des motifs qui l'avaient porté à faire arrêter, et qui l'autorisaient à détenir, contre leurs volontés, des citoyens que nos lois protégeaient. Il y comparut, vêtu de son brillant uniforme, ceint de sa redoutable épée, et suivi d'un superbe cortège d'aides-de-camp et autres officiers, armés comme lui, dont la contenance martiale ue

laissait aucun doute sur leur noble dévouement aux lois de leur pays, peut-être; mais surtout à leur illustre général.

L'honorable George Mathews était sur le siège. Ce spectacle étrange, dans le temple de la justice, eut lieu de le surprendre, comme il surprit tous les vrais amis de nos institutions; mais certes il fut loin d'en être ébranlé.

En réponse au mandat de la Cour, un discours aussi jésuitique que prompt, où les titres de "Général et commandant en chef de cette division militaire" étaient fréquemment répétés, avec une complaisante emphase, fut prononcé du ton le plus solennel. Ce discours se terminait par un insolent aveu que les détenus avaient été arrêtés par les seuls ordres du général, qui se chargeait de toutes les conséquences de leur détention. Il fut écouté avec ce calme, cette impassibilité qui caractérisent de véritables juges, mais, dès que le dernier mot fut articulé, la cour déclara, comme l'auditoire s'y attendait, qu'il était insuffisant pour satisfaire à la loi qui ne pouvait reconnaître à un général le pouvoir de faire arrêter des citoyens.

Ce n'était pas là l'effet que s'était promis l'auteur d'un discours préparé avec tant de soins et débité avec tant de confiance et d'arrogance. Comment supposer, au fait, que, dans une petite ville, naguères soumise au sceptre d'un roi absolu, située à cinq cents lieues du siège du gouvernement général, sans moyens de protection immédiate, il pût se trouver un tribunal assez fidèle à ses devoirs, assez ami de la liberté, possédant assez d'énergie pour s'opposer à ce qu'un Général, dépositaire de toute la force armée, s'élevât au dessus des lois? Un redoublement d'audace devint nécessaire, de nouveaux efforts indispensables, pour couronner l'œuvre de l'oppression. On le sentit aussitôt, car, en cela, il n'est jamais en défaut l'instinct militaire qui lutte contre l'ordre civil!—et soudain les voûtes du temple de la justice retentirent d'une insultante diatribe, non pas contre les juges directement, mais contre l'avocat qui avait osé solliciter le mandat protecteur. Les invectives, la jactance, les calomnies, la menace y furent tour-à-tour employées; et, afin de mieux assurer le triomphe de l'épée sur la toge, on déclara, d'un ton plus élevé, qu'accompagnait un regard étincellant de colère, qu'on traiterait l'avocat des détenus, et, quiconque oserait le soutenir, "sans avoir égard à la place ou au rang occupé dans le pays" comme complices des traîtres que le salut de la patrie avait, dit-on, commandé de priver de la liberté.

O vous, confrères qui m'écoutez, et qui croyez, peut-être, vous faire une juste idée des sensations que fit éprouver, à tous les spectateurs, la scène que je viens d'esquisser, songez que c'était la première fois que, dans une contrée régie par la constitution des Etats-Unis, on voyait commettre un aussi scandaleux outrage à la majesté des lois. Depuis lors, on nous a malheureusement accoutumés à d'aussi flagrantes violations de nos franchises et de notre pacte-social; violations auxquelles le peuple a paru applaudir, comme s'il eût voulu avouer qu'il ne se sentait pas la force de conserver et de transmettre intact à sa postérité, le noble héritage qu'il avait reçu des immortels fondateurs

de l'indépendance Américaine! Cette affligeante vérité me fait craindre qu'eussé-je la mâle et vigoureuse éloquence d'un Demosthène, je ne saurais parvenir à vous soulever d'indignation comme l'étaient les bons citoyens qui assistaient à cette scène odieuse, et comme il serait à désirer que le fût tout sincère ami de la liberté, au seul récit de ces usurpations de pouvoirs, de ces actes insolens de Tyrannie.

Pour moi, qui avais fui, depuis cinq ans, le despotisme naissant du plus grand capitaine des tems modernes, je craignais, je tremblais à l'idée que la liberté, mon idole, ne fût, sur le sol de ma patrie adoptive, qu'un mot aussi vide de sens que sur celui des trois quarts de la vieille Europe soumis aux hommes du droit divin.

C'était Edouard Livingston que le général attaquait avec tant de témérité, dans le sanctuaire de la justice; Et ce fut là que cet illustre avocat déploya dans toute sa vigueur, comme dans toute sa richesse, son mâle et brillant talent oratoire.

L'accusateur, content des coups qu'il avait portés, levait fièrement sa tête superbe, lorsqu'Edouard Livingston, qu'il croyait terrassé, et que la Cour s'appêtait à couvrir de l'égide des lois—se leva à son tour, avec cette aimable simplicité qui plaisant tant dans toutes ses manières; et, après avoir modestement remercié les juges de la part qu'ils semblaient prendre à sa situation, improvisa un de ces discours, dignes du consul Romain confondant Catilina, qui saisissent, émeuvent, électrisent, subjuguent, transportent, foudroyent, et laissent à peine la faculté de s'apercevoir que ce n'est qu'un homme qui parle et non pas un Dieu qui tonne.

Qui était grand alors? Oh! ce n'était sûrement point le "général commandement de la division militaire;" ce n'était pas le bel état major de sa suite. Le règne de la justice recommençait. Les hommes rentraient à leur place, et la terreur, au moyen de laquelle ils avaient cru se grandir et se rendre redoutables, s'évanouissait. En respirant plus librement, les bons citoyens avaient la patriotique satisfaction de les voir réduits à la seule dimension que la nature et nos institutions leur avaient donnée.

Vous concevez, je pense, Messieurs, que l'on songeait bien sérieusement à une promptre retraite sans même regarder derrière soi, lorsque, tout à coup, et d'une voix ferme, la Cour prononça qu'avant de se retirer, il fallait satisfaire à son mandat en produisant les personnes arrêtées.

La difficulté était grande; mais non pas invincible. On se tira de ce mauvais pas en affirmant et faisant affirmer que les détenus avaient été embarqués pour le Nord, et que déjà, les bâtimens qui devaient les y transporter étaient hors du fleuve et de nos limites.

Dieu sait ce qu'il y avait de vrai dans ces affirmations; mais les victimes de l'arbitraire ne furent pas remises en liberté.—Ce grand et noble but ne put pas être atteint, mais les inculpations, les menaces qui avaient provoqué la belle et foudroyante improvisation d'Edouard Livingston, restèrent sans effet; et de ce moment les arrestations militaires cessèrent, l'empire des lois se rétablit et les vieilles fortifications que l'on

relevait à grands frais, pour résister à l'armée de traîtres et de bandits qu'on nous assurait être en marche pour envahir notre Territoire, faire main-basse sur les riches métaux de nos Banques, et ériger notre cité en capitale d'un empire nouveau, furent bientôt abandonnés; car au grand étonnement des bons patriotes, qui sont toujours prêts à applaudir aux coups d'état; quand les apprentis despotes les font au nom du "Salut public," cette prodigieuse armée dont on avait effrayé plus d'un brave (notre gouverneur le premier) ne parut jamais nulle part.

Si, comme on ne saurait le nier, l'orateur dont je viens de parler se couvrit en cette occasion d'une véritable gloire, l'honorable George Mathews s'y fit admirer et justement estimer par son impassibilité, sa fermeté, et sa fidélité à la constitution et à nos lois. Dieu veuille que nous ayons toujours de tels défenseurs de nos droits et de tels juges. Avec eux, dans les temps de crises, les institutions faites pour protéger la liberté individuelle sont quelque chose; sans eux elles ne sont que de simples théories, que l'ambition audacieuse peut impunément fouler au pied.

Jusqu'ici, Messieurs, sûr que je suis de n'avoir rien fait passer sous vos yeux, rien appelé à vos souvenirs qui ne soit conforme à la vérité, je ne saurais penser qu'il puisse s'élever une seule voix pour nier que, dans la personne de George Mathews, nous ayons vraiment un excellent juge. Mais s'il restait quelque chose à désirer, avant de prononcer irrévocablement cette opinion, je dirais: lisez les nombreuses sentences qu'il a rendues, pénétrez vous des difficultés qui accompagnent, en tout pays, la sublime tâche de l'homme intègre chargé de rendre les oracles de la justice; et considérez, de bonne foi et sans préjugés de nations ou de cotteries, combien étaient grandes et multipliées celles qui se présentaient incessamment à nos tribunaux, tant en raison des hommes qu'ils avaient à juger qu'en raison des lois qu'ils avaient à appliquer.

Vous le savez, Messieurs; il ne suffit point d'une raison sûre, d'un jugement sain, et d'un grand fond de probité pour bien remplir les devoirs de juge: Il faut encore réunir à ces dons indispensables, la connaissance la plus parfaite, non seulement des hommes et des lois en général; mais des hommes que l'on a pour justiciables, et des lois dont on est chargé d'interpréter et d'appliquer les dispositions.

Or cette connaissance si nécessaire, comment l'acquérir? Les hommes! quel est celui qui osera se flatter de les bien connaître? quoiqu'en ait dit l'orateur Romain, il serait bien difficile de comprendre ce qu'ils sont dans une définition qui convînt à toute l'espèce et à chaque individu.

Depuis l'homme simple et paisible qui suit de bonne foi, sans s'inquiéter de les analyser, les préceptes de vertu et d'honneur qu'il a reçus de ses honnêtes parens, jusqu'à l'homme turbulent pour qui tout frein social ou religieux est insupportable. Depuis le citoyen éclairé que l'étude et la méditation ont pénétré convaincu que la sagesse, la probité, l'honneur, l'amour du prochain et de la patrie ne

sont pas de simples termes de convention; qui, honnête homme et bon citoyen; les recommande constamment, comme seuls capables de conduire les hommes et les sociétés au bonheur; jusqu' à l'ennemi de l'ordre social et du genre humain qui affecte de penser et essaye de persuader qu'il n'y a ni bien ni mal moral sur la terre. Depuis le méprisable sycophant qui ne rougit point de se faire l'admirateur et le chantre des excès et des vices les plus scandaleux de l'homme riche ou puissant aux dépens duquel il vit; jusqu' à l'ambitieux démagogue qui vise à tout niveler, afin de n'avoir personne au dessus de lui, par la fortune ou le mérite, et de se faire l'idole des masses que ses théories désorganisatrices ont séduites et égarées. Depuis l'homme simple qui se laisse aller à l'espérance chimérique et ruineuse de voir métamorphoser en quadruples la piastre fruit de son honnête labeur et de ses sages économies, par le seul effet d'une enchère à une vente publique pompeusement annoncée; jusqu'à l'artificieux spéculateur qui, avec le secours d'un habile ingénieur, transforme sur le papier, les champs incultes, les bois impénétrables, les marais profonds, les prairies tremblantes,—en rians villages, en villes manufacturières, en cités majestueuses, que des centaines de milliers d'hommes, vont se hâter de venir, Dieu sait de quelle partie du monde! vivifier par leur présence et enrichir par leur industrie; on voit partout, ici comme ailleurs, des variétés sans nombre.

Si, lorsqu'on porte ses regards sur les innombrables travaux de l'homme; lorsqu'on examine l'admirable diversité des produits de son industrie, les merveilles des arts qu'il a inventés, les progrès qu'il a faits et ne cesse de faire dans les sciences; si, même, lorsqu'on se borne à le considérer comme le créateur et l'unique possesseur de l'écriture:

..... "cet art ingénieux  
De piandré la parole et de parler aux yeux;"

l'on ne peut qu'être frappé de son immense supériorité sur tous les autres êtres organisés de la Création:

Si, en voyant l'homme traverser les mers sans fonds, sur le fragile vaisseau que ses débiles mains ont construit, conquérir des mondes que son génie actif a devinés, que son courage intrépide a découverts; Là où naguères tout n'était que déserts et vastes solitudes, fonder comme par enchantement des Colonies, des Etats, des Empires, peuplés, riches et puissans; si, en le voyant calculer la marche des astres, mesurer le ciel, "lui arracher ses foudres," produire le terrible fracas et les épouvantables effets de son tonnerre; et, au moyen d'un peu d'eau qu'un peu de feu convertit en vapeurs, franchir les distances avec la rapidité de l'aigle, sur des chars où sont entassés les plus lourds fardeaux; et faire ainsi disparaître ces distances au point de sembler avoir usurpé la prérogative toute divine de se trouver en plusieurs lieux à la fois; si en contemplant tant de prodiges, l'on est justement fier d'appartenir à l'espèce et tente de se croire le roi de la terre.

D'un autre côté, quand on réfléchit à la folie, à l'extravagance, aux vices, à l'injustice, à l'égoïsme, à l'inhumanité, à la cruauté des actes des individus et même des sociétés; quand on pense aux désordres, aux maux, aux calamités qu'enfantent l'orgueil, la bassesse, la crédulité, l'hypocrisie, la cupidité, la corruption, la vénalité de plusieurs; la dépravation, l'arrogance, l'ambition, la soif ardente du pouvoir, l'intrigue, la mauvaise foi, la duplicité des autres; En vérité, la haute la sublime idée que l'on avait eu tant de plaisir à se faire de la supériorité de l'espèce, s'affaiblit singulièrement, et ce n'est pas toujours sans raison que le sage passe de l'admiration au dégoût et à la misanthropie.

Partout, et plus particulièrement, peut-être, dans les pays parvenus à une grande civilisation et à un très haut degré de prospérité, on voit les hommes courir avec ardeur vers un double but que, par des chemins divers, plus ou moins tortueux, ils brûlent tous d'atteindre. Ce but, quel est-il? Le pouvoir et la richesse. Pour s'y rendre, ils se poussent, se pressent, se heurtent, se froissent tout en faisant entendre très haut, les mots patriotisme, désintéressement, vertu, probité: tout en déclamant contre les désordres du temps, la rapacité des gens en place, l'apathie du peuple, et tout les genres de corruption qui naissent selon eux de la possession des trésors et de l'exercice de l'autorité.

Chez nous, Messieurs et confrères, quels étaient les hommes que l'honorable George Mathews avait à juger?

À son arrivée, la Louisiane avait encore une population blanche à peu près homogène. Les agens de Charles 3 et de Charles 4, s'y étaient, depuis d'assez nombreuses années, conduits assez sagement pour faire oublier ou pardonner les actes d'inutile cruauté par lesquels O'Reilly, d'exécrable mémoire, avait pour signaler la puissance de son maître sur les rives du Mississippi, immolé de nobles et généreux colons, pour les punir de leur attachement, hélas, bien naturel! à la France leur mère qui les avait pourtant abandonnés. Les Espagnols s'étaient, en quelque sorte, fondus avec les créoles; ils en avaient adopté les usages et les mœurs. Ceux-ci avaient conservé, avec la langue de leurs pères, leur esprit rif en enjoué, leur caractère mobile, mais confiant et doux, liant et communicatif, leur obligeance naturelle et leurs vertus hospitalières. Ils ne formaient encore en 1805 qu'une seule et même famille, chez laquelle l'étranger trouvait toujours un accueil si cordial, qu'il pouvait à peine se persuader que sa bonne étoile ne l'avait pas amené au milieu de bons et tendres frères, heureux de le revoir après une trop longue absence.

Mais bientôt, cette Louisiane si cruellement dénigrée par des hommes qui doivent presque toute leur illustration à la valeur et au patriotisme de ses enfans; cette Louisiane si prompte à oublier l'injure pour ne se rappeler que des services rendus; cette Louisiane qui, plus d'une fois, s'est généreusement vengée d'un outrage par de nobles bienfaits, vit chaque année, chaque mois, chaque jour, sa population s'accroître d'hommes de toutes les origines, de toutes les croyances, de toutes les professions, accourus de toutes les régions civilisées de

la terre; les uns fuyant le foyer de leurs pères, pour se soustraire aux persécutions de leurs ennemis politiques; les autres proscrits, exilés par les révolutions; ceux-ci pour exercer un art peu encouragé dans leurs pays; ceux-là pour partager avec les anciens habitants, les chances de fortune qu'offraient un sol riche encore vierge, et un commerce qui ne pouvait que grandir sous le gouvernement le plus libre du monde: tous de langues, d'éducation, de mœurs, de préjugés, de principes différens; n'ayant entr'eux aucun lien commun; et que la poursuite d'intérêts particuliers devait pour long tems empêcher de se fonder ensemble.

Voilà les hommes que George Mathews avait à juger: pensez vous qu'il lui fût possible de les bien connaître?

Et les lois instituées pour modérer tous les excès, reprimer tous les désordres, protéger tous les droits, rendre à tous la justice, qu'étaient-elles et que sont-elles maintenant chez nous? Il serait difficile de dire avec vérité qu'elles sont tout ce qu'une raison éclairée pourrait désirer qu'elles fussent: Non pas que, depuis trente deux ans, nous ayons cessé d'en faire chaque année un nouveau volume; mais bien parce qu'à force d'amender pour perfectionner, de modifier pour rendre plus juste, d'innover pour répondre à de nouveaux besoins, d'abroger pour rendre plus simple, nous sommes parvenus à rendre obscur ce qui était clair, insuffisant ce qui était complet, embarrassant ce qui était facile, in intelligible ce que tout le monde comprenait; et à nous appauvrir au point d'être dans la nécessité d'emprunter chez les autres ce qu'autrefois on empruntait chez nous.

Dès 1805, les lois Espagnoles et Romaines, écrites dans des langues peu familières, il est vrai, à plusieurs fonctionnaires publics, comme à la majeure partie des anciens et nouveaux habitants, portèrent ombre à des personnes, dont la raison obscurcie par des préjugés nationaux, repoussait l'idée très simple cependant, que des lois recueillies et mises en ordre, depuis de nombreux siècles, pussent au 19<sup>e</sup> siècle convenir à l'administration de la justice civile, chez un peuple libre.

De là plusieurs tentatives, afin de se défaire de ces lois; et pour y substituer un droit contumier, Anglo-Saxon-Normand, connu sous le nom de Loi Commune. Droit très respectable, sans doute; mais sous l'empire duquel la justice est souvent tellement entravée dans sa marche, que les pauvres plaideurs sont obligés de recourir à d'autres tribunaux que ceux de la loi; c'est-à-dire, à des Cours d'Equité qui, sans qu'on s'en doute, peut-être, ou qu'on veuille l'avouer, ne font autre chose que suivre et appliquer les règles éternelles de la justice naturelle qu'elles prennent dans le droit Romain.

La première des ces tentatives fut faite lorsque l'honorable John B. Prevost occupait seul le siège de notre Cour Supérieure. Edouard Livingston, James Brown, Louis Moreau-Lislet, Pierre Derbigny, un cinquième membre de Barreau que je dois m'abstenir de nommer, se réunirent pour s'y opposer.

La phalange de leurs antagonistes, Ecossais, Anglais, Irlandais et autres, se présentait assise sur la loi organique de la Cour, qui portait

qu'elle aurait juridiction de loi commune. C'était sur cette base unique qu'ils élevaient l'ouvrage formidable du haut duquel l'artillerie de leur éloquence allait foudroyer l'antique édifice de la législation civile du pays.

Leur attaque fut vive; ils firent les plus héroïques efforts pour s'assurer de la victoire! Mais Livingston parla, à sa voix le menaçant et foudroyant ouvrage des nouveaux Titans, croula sur sa base; et l'oracle qui sortit aussitôt de la bouche de l'honorable John B. Prevost en balaya les décombres légères et les dispersa.

Etourdis, stupéfaits de leur si prompt défaire, ces fiers assailans, qui voyaient, non sans regrets, peut-être, une inépuisable mine de riches procès leur échapper, ne concevaient pas qu'on eût pû démolir si complètement et si vite, ce que leur génie n'avait bâti qu'avec autant de peine que d'art. Ne nous en étonnons pas: ils n'avaient pas compris (et c'était peut-être autant la faute de la nature que de leurs études imparfaites) que les termes sacramentels de la loi dont ils s'appuyaient, pouvaient bien signifier que la Cour Supérieure n'exercerait pas la juridiction des Cours d'équité, mais n'introduisaient nullement dans le Territoire d'Orleans, leur loi commune d'Angleterre. Jugez, Messieurs, de l'excès de leur aveuglement: la même loi sur laquelle ils se fondaient, organisait aussi le pouvoir législatif, et contenait cette disposition précise que "toutes les lois qui étaient en force dans le pays, continueraient d'y être observées jusqu'à ce qu'elles fussent modifiées, changées ou abrogées par la Législature!"

La seconde tentative se fit après que John B. Prevost eût donné sa démission, que le Juge Sprigg nous eût quitté et lorsque l'honorable George Mathews siégeait seul, en vertu de la loi qui le voulait ainsi. Elle n'aurait peut-être pas eu lieu si la décision rendue lors de la première, avait été transcrite sur les minutes de la Cour. Cette omission qui surprit, fut la seule cause, j'imagine, du nouveau courage que les ennemis de nos lois d'employèrent dans cette seconde attaque, attaque dont le résultat fut le même qu'auparavant, c'est-à-dire tout aussi peu glorieux et pas plus profitable pour ses vaillans auteurs.

Vous concevez sans doute, Messieurs, l'imminence du péril dans lequel se trouvaient, à l'une comme à l'autre époque, non seulement les lois civiles du pays; mais encore les fortunes de ses anciens habitans.

Que seraient-elles devenues ces fortunes, si l'on était parvenu à opérer la révolution dont ces deux tentatives impies les menaçaient? Quel Louisianais aurait osé se mouvoir sans avoir à ses côtés un légiste versé dans la connaissance de ces lois étrangères, élevées brusquement sur les ruines de celles de son pays? qui aurait su comment traiter valablement avec son voisin, comment disposer ou recevoir, sans inquiétude, par donation ou testament? qui aurait connu le degré de puissance qui lui appartenait sur sa femme, ses enfans, ses esclaves? quelle femme aurait pu avoir une idée de ses droits ou de la nature et de l'étendue de ses devoirs, comme épouse comme mère?



Convenons qu'elle eût été bien déplorable la situation de cette nouvelle et belle partie de l'union, si l'honorable John B. Prevost d'abord, puis l'honorable George Mathews n'avaient été doués que de vues aussi courtes, pour ne pas dire aussi subversives de toute justice, que pouvaient l'être celles des audacieux qui, présumant plus de leurs forces que de leur bon droit, avaient eu la témérité de porter leurs mains sacrilège sur ce que tout alors leur commandait de regarder comme l'arche sainte.

Avouons que les décisions de ces deux juges consciencieux, dans ces circonstances critiques, furent, en vérité, le salut de ce peuple de la Louisiane, si hospitalier, si confiant, si éminemment ami de l'ordre, si profondément pénétré d'un respect religieux pour les droits d'autrui!

En 1808, la législature, dans la vue de satisfaire aux exigences qui lui parurent les plus raisonnables, décréta la formation d'un digeste, en langues Française et Anglaise, des lois civiles du pays.

Cet important travail fut fait.

Mais il est possible que, lorsqu'il parut, on ait eu plus d'une raison de regretter qu'on n'eût pas fait ici ce qu'ont fait les Anglais dans l'île de la Trinité, qui, lorsqu'elle passa sous le Trident Britannique, se trouvait précisément dans la même situation que la Louisiane, lorsqu'elle vit la glorieuse bannière étoilée arborée sur son sol.

Là, par ordre du gouvernement, les lois Espagnoles furent recueillies et traduites en Anglais. Ici, rien ne s'opposait à ce qu'elles le fussent dans les deux langues que nous parlons.

Ce parti, qui n'aurait pas été fort dispendieux, aurait au moins pu avoir, ainsi que le disait l'honorable George Mathews, l'avantage de nous mettre en état de ne songer à une réforme qu'après nous être bien assurés, par l'étude, la méditation et l'expérience, de la nécessité d'y travailler pour concilier tous les intérêts et tous les besoins, et opérer, autant que possible, et sans moyens violents, une fusion, sans doute désirable, des nouveaux venus avec les anciens. Ce sage magistrat pensait que si ce parti avait été adopté, nous aurions tous eût plus d'un sujet de nous en féliciter.

Et qu'on ne lui fasse pas l'injustice de croire qu'il ne s'exprimait de la sorte que par condescendance, ou par l'effet d'une admiration peu éclairée du droit Romain et du droit Espagnol. Si ce que j'ai déjà eu l'honneur de dire du mérite de cette législation et de l'étude qu'il en avait faite ne suffisait pas pour justifier sa pensée, rien ne serait plus aisé que d'y parvenir: Et les personnes disposées à en douter, seraient probablement fort étonnées si on leur apprenait que plusieurs des grands principes qui ont été consacrés par nos constitutions l'avaient été par le droit Romain et le droit Espagnol, quelques centaines d'années avant que l'immortel Colomb ne découvrit notre hemisphere. Qu'on ouvre le droit Romain, et le code d'Alfonse le Sage; on y verra, tracée en termes énergiques, cette règle, souveraine protectrice des droits acquis, et de la fragilité humaine "qu'aucune loi ne doit avoir d'effets rétroactifs."—On verra que bien des siècles avant qu'on ne songeât en Angleterre, *au writ d'habeas corpus*,

pour protéger la liberté individuelle, les Romains avaient, dans un Edit du Prêtre, recueilli dans le Digeste de Justinien, leur interdict, leur writ, "*de homine libero exhibendo*." Que fallait-il de plus pour recommander ces lois au respect et à l'admiration d'un homme aussi essentiellement juste, aussi profondément sensé que l'honorable George Mathews?

Cet excellent citoyen, ce magistrat impartial, pensait aussi que plusieurs dispositions de nos anciennes lois Castillannes, celles relatives aux donations et testaments surtout, étaient beaucoup plus conformes à l'esprit et au but de nos institutions républicaines, que ne le sont certaines lois ou coutumes, filles de la féodalité, qui de l'Angleterre, où l'intérêt d'une puissante oligarchie leur conserve tout leur empire, sont venues s'établir sur le sol Américain, avec le puritanisme naguère encore ennemi de toute liberté de conscience.

Cette opinion paraîtra peut-être fort étrange, mais sa justesse est aisée à démontrer.

Que dans une monarchie, ou dans une république toute aristocratique, la législation s'applique constamment à donner aux parens qui ont amassé des richesses, le droit de favoriser tel ou tel de leurs enfans au préjudice des autres, afin de mettre le préféré en état de soutenir ce qu'ils appellent l'illustration de leur nom, ou la splendeur de leur maison; c'est une conséquence toute simple de la nature du gouvernement qui vise, sans cesse, à concentrer tout ce qui donne de la considération ou de l'influence, de la puissance ou de la force, chez ceux qui entourent les dépositaires de l'autorité suprême ou qui se la partagent.

Mais, bien certainement, rien n'est plus contraire à l'esprit et au but d'institutions politiques, basées sur le dogme de la souveraineté du peuple; rien n'est plus à redouter dans une république comme la nôtre, où il est à désirer que tous les citoyens aient autant que possible, les moyens de vivre honnêtement et dans l'indépendance les uns des autres.

Or l'ordre des successions et les règles de leurs partages, tels qu'ils étaient établis par les lois générales de la vieille Espagne, étaient très conformes à l'esprit, et très favorables au but d'un gouvernement populaire.

En effet, en limitant à un cinquième de ses biens, la portion dont un père pouvait librement disposer par donation ou testament, ces lois avaient l'effet inévitable de diviser et subdiviser continuellement les grandes fortunes, et de faire ainsi une plus égale distribution des biens entre les citoyens.

Il ne saurait être vrai de dire que la faculté illimitée de tester est compatible avec les grands principes de nos institutions républicaines. Elle convient tout au plus à l'égoïste impudent qui ne veut de la liberté que pour lui seul, et qui se cabre à l'idée que les lois soient moins faites pour favoriser ses injustes prédilections, que pour pourvoir au bien être de sa postérité.

Que les lois accordent cette faculté monstrueuse, et vous-verrez

peut-être beaucoup plutôt qu'on ne saurait le penser, la majeure partie des fortunes entassées, par l'orgueil descendant au tombeau, sur des têtes rapaces aussi improductives qu'avidées de distinctions et de puissance.

Que les lois accordent cette faculté antilibérale, et vous-courrez en peu de tems le risque d'avoir à la tête de votre pays, une dangereuse aristocratie, la plus arrogante et la plus insupportable de toutes; celle des richesses. Vous aurez avec elle, et rampant à ses pieds, une "classe nombreuse et toujours croissante d'hommes exposés à toutes les tentations de l'indigence, de prolétaires nécessaires, toujours prêts à se vendre au plus offrant."

Que deviendra alors le dogme fondamental de la souveraineté du peuple? Malheur aux états libres dont la législation imprudente, tend à concentrer les fortunes au lieu de les diviser. Le pouvoir passe souvent du côté où sont les trésors.

La faculté illimitée de disposer par testament, est aussi très nuisible à la prospérité des pays agricoles. Ce n'est en vérité que lorsque la terre est morcelée entre un grand nombre de propriétaires actifs et laborieux, qu'elle produit tout ce qu'elle peut produire.

Si Rome républicaine avait eu les lois d'Alfonse le Sage, en matière de successions, aurait-elle jamais entendu parler de lois agraires? Son sénat aurait-il aussi souvent porté les citoyens à la guerre extérieure, si cet affreux expédient ne lui avait pas été indispensable afin de préserver le corps social des commotions sanglantes dont le menaçaient fréquemment les provocations au partage des terres.

Le droit de propriété ne peut pas renfermer celui de disposer de sa fortune sans restriction. Etabli et protégé par la loi, il est de la sagesse des nations, qu'il soit renfermé quant à son exercice, dans les limites qui l'avantage général commande d'y apporter.

Le père qui réclame le libre exercice de ce droit, dans toute son étendue, oublie, sans doute, deux devoirs sacrés qui lui sont imposés, l'un par la nature, l'autre par la société, le premier, de chérir également tous ses enfans, le second, de ne rien faire qui tende à ce qu'aucun d'eux devienne à charge à ses concitoyens.

Et qu'il me soit permis de le dire, après l'honorable George Mathews; ce n'est ni dans un pays ni dans un siècle où, grâce à ce que nous appelons le progrès, les unions illicites semblent ne plus devoir être frappées de réprobation, que la faculté illimitée de tester peut être autorisée par les lois; à moins qu'on ne soit disposé à voir, avec une indifférence anti-sociale, les enfans nés des mariages légitimes, dépouillés pour enrichir les autres, les fortunes des familles passer des mains des blancs au pouvoir des gens qui peuvent trouver leurs ayeux entre le Cap Verd et le Cap de Bonne Espérance, et les tartufes apôtres de négrophilisme niveler, par ce moyen puissant, les classes libres et affranchies; puis sceller du sang des unes et des autres, confondu dans une vaste hécatombe, l'acte infernal d'abolition auquel ils travaillent au nom du ciel, et qui leur est dicté, peut-être,

par la mensongère philanthropie de l'étranger, aussi jaloux qu'inquiêt de nos prospérités.

D'un autre côté, le père qui regrette de ne pas avoir ici la plus entière liberté de disposer de sa fortune par testament, ne commet-il pas une erreur en pensant que ce serait pour lui une garantie de l'affection ou du respect de ses enfans? Est-ce à dire qu'un jeune Anglais se distingue plus qu'un jeune Castillan par sa piété filiale? Plaignons le père qui ne pourrait se flatter d'obtenir l'amour et l'obéissance de son fils, que par la crainte qu'il saurait lui imprimer d'être déshérité. Il ne peut pas être vrai que l'éloquente et douce voix de la nature ne fasse plus vibrer les cœurs de ceux qui nous doivent le jour, qui ont toujours été l'objet de notre plus tendre sollicitude: Il n'est pas possible qu'un misérable intérêt pécuniaire ait plus d'empire sur eux. Ah! pour notre propre honneur, sachons imposer silence à une raison qu'égarent sans doute des préjugés d'une autre époque. Ne proclamons pas faussement, dans la seule vue d'obtenir que, dans ces matières importantes et délicates, la loi soit, sur les bords du Mississippi, ce qu'elle est sur les bords de la Tamise, que le piété filiale ne peut habiter sous nos toits qu'autant que l'intérêt l'y retiendra: on pourrait croire que la tendresse paternelle n'y résida jamais.

D'ailleurs la loi Espagnole, en limitant la portion disponible voulait qu'un père pût déshériter son fils dans plusieurs cas. Lors, par exemple, que le fils osait frapper le père, l'offenser de paroles, l'accuser de crimes, le priver de sa liberté, le diffammer; dans chacun de ces cas et dans plusieurs autres, le père avait le pouvoir incontestable de le punir par un exhérédation.

Ainsi vous voyez, Messieurs, que la législateur avait bien sagement concilié les obligations du père envers les enfans, avec les devoirs des enfans envers le père. Il avait fait plus: Il avait institué la puissance paternelle, espèce de magistrature suprême, qui était la plus sûre sauvegarde des vertus de la famille.

Cette puissance était fort étendue, il est vrai; mais le père n'en pouvait pas abuser. Le fils pouvait se faire émanciper et passer de son joug devenu trop lourd, sous l'autorité protectrice d'un tuteur plus sage et plus humain.

Mais je sens, peut-être un peu tard, que je pousse trop loin cette digression qui ne peut trouver son excuse que dans le reproche inconsideré, trop souvent adressé à certains jurisconsultes, de rester attachés aux anciennes lois du pays.

Permettez moi néanmoins de faire entr'elles et nos lois nouvelles, quelques rapprochemens qui, ce me semble, ne sont pas très favorables à celles-ci.

Sous l'empire des lois Espagnoles, comme sous le régime de nos Codes, il était accordé un appel du juge inférieur au juge supérieur. Cet appel était *suspensif*, quand il était formé dans un certain délai. Il n'était que *dévolutif*, quand il était fait hors de ce délai. *Suspensif*, il laissait les choses in *statu quo*, jusqu'au jugement du tribunal suprême. *Dévolutif* il n'arrêtait point l'exécution du jugement. Cette

exécution avait lieu; mais à la charge par le plaideur qui avait triomphamment de fournir bonne caution de remettre les choses au même état, si, sur l'appel, le jugement était cassé.

Ainsi, quand les biens d'un défendeur injustement condamné en première instance, avaient été saisis et vendus en exécution du jugement, dont appel *dévolutif* seulement avait eu lieu, si, en dernière analyse, ce plaideur triomphait à la Cour Suprême et y gagnait son procès, il était remis en possession de ses biens, et replacé au même état qu'auparavant.

Aujourd'hui, Messieurs, vous le savez, il n'en est plus ainsi. La loi nouvelle exige que, même, lorsqu'un appel est fait dans le délai voulu pour qu'il suspende l'exécution d'un jugement de première instance, l'appelant fournisse caution de le poursuivre, et de payer le montant des condamnations et de frais, si ce jugement est confirmé par le tribunal supérieur. S'il ne fournit pas cette caution, ou s'il laisse écouler ce délai, son adversaire peut faire saisir et faire vendre ses biens, s'en faire payer, et disposer librement de ce qu'il en a reçu. Rien ne pouvait arrêter cet adversaire ou l'empêcher d'agir avec cette dangereuse diligence. Il se hâtera probablement de profiter de cette circonstance toute favorable à ses intérêts, s'il n'est pas de bonne foi, ou si sa cause ne lui inspire pas une confiance absolue; et pourquoi? c'est que la loi nouvelle ne lui dit pas, comme le faisait l'ancienne: "Tu peux bien faire exécuter le jugement que tu as obtenu, puisque ton antagoniste n'a pas satisfait à mes exigences, afin de rendre son appel *suspensif*; mais-tu fourniras toi-même, auparavant, bonne et suffisante caution de lui rendre la paisible possession des biens que tu veux faire saisir et vendre, et de le rétablir dans la situation où il était avant ton procès, si la sentence du tribunal suprême casse le jugement de la Cour inférieure." Ainsi, sous notre législation présente, c'est en vain qu'un plaideur qui n'a pu faire qu'un appel *dévolutif*, obtient à la fin une justice éclatante contre l'homme injuste qui l'a poursuivi; c'est en vain que le tort que lui a fait l'ignorance ou l'incapacité du juge de première instance, est réparé par la sagesse des juges en dernier ressort. Si, après avoir palpé le produit de l'injuste, mais légale expropriation qui a suivi le jugement erroné, le demandeur l'a dissipé, ou a pris la fuite et n'a laissé aucune propriété, les biens du plaideur malheureux qu'avait condamné un juge ignorant ou imbécille, lui sont ravis sans retour. Dépouillé, réduit à la misère, il ne lui reste d'autre ressource que ses larmes et celles de ses enfans, d'autre consolation que la stérile sentence de la Cour d'appel.

N'êtes-vous pas frappés de ce désolant contraste? laquelle des deux lois est la bonne? certes la partialité la plus effrontée, n'osera pas dire que c'est la nouvelle! Et pourtant elle est l'ouvrage de ce que nous appelons *notre sagesse*; elle est le produit d'un siècle *éclatant en prodiges*; tandis que la loi Espagnole, qui protégeait également les droits d'un appellant et ceux d'un intimé, était l'œuvre de la volonté d'un seul homme appelé roi ou tyran, et le produit d'un siècle de barbarie.

Ne nous imaginons point que cette inique loi nouvelle ne puisse pas porter tous ses fruits amers. Déjà elle l'a fait, et d'honnêtes pères de famille ont été complètement ruinés. Combien l'honorable George Mathews n'a-t'il pas déploré la cruelle nécessité où cette loi désastreuse a mis notre Cour suprême de sanctionner une si flagrante spoliation! ah! craignons qu'elle ne fasse souvent de nouvelles victimes. On ne saurait trop se hâter de l'arracher de nos Codes.

Plut à Dieu, Messieurs, que l'inconcevable soif d'innovations qui n'a pas encore cessé de nous tourmenter, que la dangereuse manie de substituer les essais de nos courtes vies, aux leçons d'une longue expérience, n'eussent été funestes au bon droit que dans les cas auxquels je viens de faire allusion! mais ce n'est ici, ni le lieu, ni l'occasion de m'étendre d'avantage sur ce sujet inépuissable.

Je crois d'ailleurs avoir suffisamment justifié l'opinion qu'avait émise l'honorable Juge Mathews que si, au lieu de tant nous empresser de faire des Codes, nous eussions traduit et étudié les lois que nous n'entendions pas, faute de les savoir lire, nous aurions en plus d'un sujet de nous en féliciter. Il faut, ne nous le dissimulons point, des esprits d'une bien grande portée, des juristes d'une bien vaste érudition et d'une bien rare sagacité, des législateurs bien éclairés, bien prévoyans, bien sages pour faire de meilleurs digests que celui de Justinien, de meilleures lois que celles d'Alfonse le Sage.

Que n'avons nous eu la prudence et la circonspection des législatures des autres Etats de l'Union? on ne les voit point toucher au système de leurs lois civiles: aussi leur jurisprudence est-elle toujours éclairée du flambeau de l'expérience des siècles.

Notre Code de 1808, avec lequel on avait en la sagesse de laisser co-exister celles des anciennes lois qui n'étaient pas incompatibles avec lui, resta en vigueur pendant près de dix huit ans. Si, ce qu'on doit avouer, il s'y faisait remarquer des imperfections, la jurisprudence, aidée des lumières qu'elle avait trouvées dans les lois Romaines et Espagnoles, avait fini par former avec lui un corps de doctrines légales, sinon parfait—quelle est l'œuvre de l'esprit humain qui le soit?—du moins assez complet, assez à la portée de toutes les intelligences un peu studieuses, pour satisfaire en grande partie aux exigences de la raison et de la justice.

Si dans le principe, nos juges allaient de tâtonnemens en tâtonnemens, (ce qui était inévitable) on peut dire avec vérité, qu'en 1825 leur marche était plus ferme, et qu'une foule de règles d'une application journalière, totalement omises dans notre digest, ou qui y étaient posées d'une manière trop abstraite ou trop vague, avaient acquis toute la clarté, toute la fixité désirables, et étaient devenues familières aux praticiens les moins instruits.

Mais, comme s'il eût été dans la destinée de notre pays que nous dussions sans cesse aller d'essais en essais, au risque de nous plonger dans la confusion, ou de tout bouleverser, des clameurs s'élevèrent contre ce digest lui-même, contre son insuffisance, et surtout contre la nécessité où l'on était encore de remonter souvent aux sources où

l'on avait pris les principes qui formaient la règle de conduite de nos tribunaux civils.—On voulait un code qui fût susceptible d'être lu et entendu par tout le monde; comme si la science des lois, de même que toute autre science, n'était pas, toujours et partout, le partage, en quelque sorte exclusif, des gens studieux qui en font leur unique occupation! On voulait un code qui embrassât tout, qui prévît tout, qui pourvût à tout; comme si un tel ouvrage pouvait jamais sortir des mains des hommes!

Un nouveau code fut fait!—Moins incomplet et sous ce rapport moins imparfait que le premier, il était néanmoins si loin de suffire encore aux exigences de la justice, que nos tribunaux se trouvaient de nouveau fréquemment dans la nécessité de fouiller dans les vieilles compilations de nos anciennes lois Castellanes et Latines, pour trouver des règles qui pussent s'appliquer aux nombreux cas particuliers auxquels ne s'appliquaient que difficilement les principes généraux contenus dans ce volumineux recueil.

Enfin, en 1828, malgré l'expérience de trois autres années de nouveaux tâtonnemens; malgré les lacunes laissées à dessein dans ce dernier code, par la sagesse de ses rédacteurs, qui n'avaient pas voulu y comprendre ce qui est du ressort d'un code de commerce, l'esprit de mécontentement se manifesta une autre fois, les hostilités recommencèrent contre les anciennes lois du pays; et, Françaises, Romaines, Espagnoles, toutes furent abolies.

Quel fut, Messieurs, le résultat de cette mesure tranchante? Ne fut-il pas tout d'abord, non seulement de nous ravir le secours des lumières de tous les siècles antérieurs; mais encore de nous priver de lois, dont le besoin se fait sentir à chaque instant de la vie? Nous avions nos propres lois commerciales—nous n'en avons plus. Nous avions un système de procédure parfaitement co-ordonné, en matières exécutoires et hypothécaires—nous n'avons plus à cet égard, que quelques titres ébauchés dans notre Code de Pratique. Nous en pouvons dire autant de tout ce qui est relatif aux divers concours de créanciers, aux attermoiemens, aux cessions volontaires, aux cessions forcées. Ainsi lorsqu'une question de droit commercial se présente, c'est aux règles, aux principes adoptés ou consacrés hors de notre pays, par des législateurs ou des juges qui nous sont étrangers, que nos tribunaux se trouvent obligés d'avoir recours. Et, dans toutes les matières exécutoires et hypothécaires, dans celles des cessions de biens volontaires ou forcées, dans les attermoiemens et remises, force leur est de suppléer à ce qui nous manque de dispositions législatives; et au lieu de s'enfermer dans leurs attributions de juges interprètes des lois, de s'ériger, en quelque sorte, en législateurs, et d'établir des règles nouvelles qu'on se croit tenu de suivre; et ce, en opposition directe aux sages principes qui forment la base fondamentale de notre organisation sociale; en violation de nos constitutions qui n'ont pas voulu que les pouvoirs législatif et judiciaire fussent confiés aux mêmes mains.

Tels furent, Messieurs, les effets désastreux de l'acte de 1828, par

lequel on toucha encore à nos codes nouveaux, dans la vue de les amender ou améliorer; l'el fut l'effet de la fameuse section 25 de cet acte, que l'honorable George Mathews, dès qu'il en eût connaissance, appela: "the great sweeping clause;" le grand coup de balai. Si c'est un progrès que de s'appauvrir; si c'en est un que d'éteindre brusquement les lumières à l'aide desquelles on peut marcher encore, sans trop trébucher, dans le labyrinthe ténébreux ou conduisent les prétentions opposées des plaideurs égarés ou de mauvaise foi; certes, c'en fut un bien remarquable que l'on nous fit faire en 1828? mais n'ayons pas la vanité de penser qu'il soit sans exemple dans l'histoire.

Au milieu du septième siècle, un certain roi, du nom de Chindasvendo, fit faire, par quelques savans de son pays, et adopta un code qu'il décora du titre de "Fuero Juzgo;" ce code était composé de six cents articles ou dispositions passablement obscurs, dans lesquels on lui persuada qu'on avait embrassé tout ce à quoi la législation d'un peuple ancien déjà, et commerçant, agricole et guerrier, devait pourvoir. Il ordonna, en conséquence, que ce chef-d'œuvre de sa sagesse, fut le seul guide à suivre par ses loyaux sujets, dans toutes les provinces Espagnoles soumises à sa paternelle domination; et, afin de mieux s'en assurer, abrogea d'un trait de plume tout le droit Romain. Nouvel Omar, ce Fisigoth s'acquit ainsi l'insigne honneur, non d'avoir détruit par le feu, mais d'avoir, par un acte de sa volonté royale, banni de tous les tribunaux de son empire, une législation entière, fruit des meditations et de la sagesse de dix siècles; que, même dans notre siècle de prodiges, les philosophes et les jurisconsultes les plus éclairés de tous les pays civilisés, s'accordent à décorer du nom sublime de raison écrite

Cette raison écrite, qu'une aveugle passion peut bien, par fois, se procurer le plaisir sauvage de renverser un instant de son trône; qui, après avoir survécu à Rome sa patrie, avait repris son empire au milieu des barbares qui avaient d'étruit la puissance du peuple-roi; elle est immortelle comme les principes de la justice naturelle dont elle est l'oracle; elle est le flambeau de la justice humaine et le sera quand des noms bien plus justement fameux que celui de Chindasvendo que je viens d'exhumer, seront tombés dans l'oubli.

Ce fut assurément pour nous, un bien triste sujet de félicitations—convenons-en avec l'honorable George Mathews—que d'avoir, au dix neuvième siècle, suivi, sans nous en douter probablement, l'exemple d'un ignorant et présomptueux despote qui régnait il y a douze cents ans: Mais espérons que bientôt, ouvrant les yeux sur cet acte de vandalisme, nous saurons reparer le mal que nous nous sommes faits. "Après avoir parcouru un grand cercle d'erreurs, le véritable progrès, le seul possible pour l'homme de la civilisation, c'est de revenir promptement vers les lois éternelles de la raison et de la justice."

Si avant 1828, il fallait à tous nos juges et à tous nos légistes beaucoup de connaissances diverses, beaucoup d'études ou de recherches, pour se bien servir des trésors de lumière et de sagesse que des siècles d'expérience nous avaient transmis, pouvons-nous nous flatter qu'ils



soient aujourd'hui ou qu'ils puissent être à l'avenir, assez riches de leur propre fonds pour suppléer à tout ce qui manque à nos Codes modernes? L'équité, nous dira-t-on; l'équité est la source à laquelle ils puiseront: Ah! craignons qu'il n'en soit de l'équité comme du sens-commun, dont tout le monde parle, que chacun croit posséder, et qui n'est peut-être, en réalité, le partage que d'un petit nombre d'êtres privilégiés de la nature comme l'était notre digne juge. Quel vague effrayant que celui dans lequel on nous a jetés! Quelle large porte n'a-t-on pas ouverte à l'arbitraire des tribunaux.

Le seul digeste Romain, copié en partie dans le Code d'Alphonse-le-Sage, contenait plus de cent quarante mille lois ou décisions diverses, dont cinquante mille peut-être s'appliquaient aux matières traitées succinctement dans les 3,522 articles de notre nouveau code. La matière des legs occupe seule onze cents textes du Digeste de Justinien: Notre code ne nous donne que trente et une règles sur ce sujet immense!

N'y aurait-il pas conséquemment un certain degré de folie à se persuader que ce code, quelques éloges d'ailleurs qu'il mérite, à beaucoup d'égards, puisse suffire à tout?—L'expérience nous avait fréquemment appris, lors même que nous étions riches des fruits de la sagesse de plus de vingt siècles, que nous n'avions pas encore tout ce qu'il aurait été désirable que nous eussions pour résoudre maintes questions qui nous paraissaient nouvelles, et qui, probablement, s'étaient rarement présentées à l'examen des jurisconsultes de l'antiquité. A quoi devons-nous ces questions nouvelles? Nous les devons peut-être à la perfectibilité même de notre espèce; mais nous les devons surtout à l'étonnant développement qu'ont pris et prennent sans-cesse les arts, le commerce, les manufactures, l'agriculture, toutes les entreprises humaines, depuis la découverte du Nouveau-Monde, le passage aux Indes Orientales par le Cap des Tempêtes, et la glorieuse révolution des colonies de l'Amérique du Nord, signal de l'émancipation du génie du commerce par toute la terre. Nous devons ces questions nouvelles au perfectionnement ou au mélange de nos langues; à la variété, à la complication, à la multiplicité infinies de nos nouveaux rapports de peuple à peuple et d'homme à homme; aux modifications que subissent nécessairement, par toutes ces causes réunies, nos contrats, nos dispositions, nos traités, nos engagements, nos obligations, par suite de notre prudence ou de notre légèreté, de notre confiance ou de nos craintes, de nos espérances ou de nos inquiétudes, de notre sincérité ou de notre manque de bonne foi.

Ainsi, Messieurs, lorsque nous voulons considérer attentivement la tâche que nos juges avaient à remplir, et les difficultés qu'à chaque pas ils devaient rencontrer, par l'effet naturel de l'instabilité de nos lois, et des nouvelles études que des changemens incessans rendaient nécessaires, qui de nous pourrait trouver étonnant qu'ils eussent fréquemment commis des erreurs graves? Qui de nous pourrait consciencieusement se plaindre, si tel eût été le résultat même général de leurs décisions? Plus j'y réfléchis, et plus je me plais à penser que

si, jusqu'à présent, nous avons eu, comme j'aime à le dire, des jugemens qui peuvent généralement supporter la critique la plus sévère, c'est que nos juges se trouvaient doués d'une sagesse supérieure à celle de nos hommes d'état.

Dans la situation où nous avons été depuis 1808 jusqu'à présent, quelle prudence, quel zèle infatigable, quelle sagacité, quelle rectitude de jugement n'a-t-ils pas fallu à nos juges, et particulièrement à ceux de nos cours d'appel, pour s'acquitter dignement de leurs devoirs? Devoirs si imposans partout, mais certes fort épineux dans un pays où la législation civile n'a aucune fixité, et au milieu d'une population telle que la nôtre. Cette population, ne l'oublions pas, se compose et se composera long tems, sans doute, d'hommes d'origines, de langues, d'éducation, de mœurs, de préjugés divers. Elle change, ou se renouvelle, en quelque sorte, d'année en année; et elle s'agite constamment en tout sens, pour exploiter les ressources que présente à toutes les industries, comme à toutes les ambitions, ce pays encore nouveau et surtout ce grand entrepôt de tous les riches produits des vastes régions occidentales de notre belle et puissante république.

Or, la prudence! l'éducation et l'expérience peuvent la donner, si d'ailleurs on a été doué par la nature, d'un esprit observateur et juste.

Le zèle! il serait difficile de nier, qu'il dépend plus ou moins de cet amour de la justice qui n'a sa source que dans un cœur vertueux.

La sagacité! la rectitude du jugement! ah! c'est du ciel seul que nous recevons ces dons si précieux, si rares, si indispensables, afin que les organes et les interprètes des lois n'immolent pas fréquemment l'innocence et l'équité dans le temple auguste de la justice, trop souvent profané par la mauvaise foi.

Qu'elle perte ne fait point conséquemment un pays tel que le nôtre, quand sonne la dernière heure d'un juge qui réunissait à un degré éminent, toutes ces inappréciables qualités, et qui, pendant trente années d'exercice, n'a, peut-être pas une seule fois donné lieu à une plainte ou à un reproche raisonnable! Cette perte est une grande et déplorable calamité publique que l'orgueil et la présomption pourraient seuls se flatter de faire oublier en peu de tems.

Dans la vieille Europe, presque entièrement soumise, même de nos jours, malgré les efforts de la philosophie, à des lois qui n'émanent et ne dépendent que de la volonté d'un homme assis sur un trône, et décoré du titre pompeux de duc, roi ou empereur par la grâce de Dieu, c'est toujours le prince que l'on bénit et auquel on rend grâces, quand on a l'avantage de voir assis sur un tribunal, un juge honnête homme, pénétré de la sainteté de ses devoirs, et toujours disposé à rendre à chacun ce qui lui appartient. Là où une éducation toute dans l'intérêt des dominateurs, et une longue habitude de la soumission, ne laissent même pas aux hommes la faculté de croire qu'en leur donnant l'existence, la nature les avait dotés de quelques droits; Là où réfléchir et raisonner est un crime, et obéir, sans examen, la première des vertus; il est en quelque sorte naturel de remercier un maître de n'avoir pas reçu de son bon plaisir, au lieu d'un vérit-

able juge, un de ces odieux tyrans subalternes qui croient ne pouvoir mieux le servir et mériter sa souveraine bienveillance qu'en opprimant ses sujets: et, lorsque l'inexorable mort vient enlever à l'amour des administrés, un juge vertueux, il est tout aussi simple que tous portent leurs prières et leurs vœux au pied du trône, et implorent ce qu'ils appellent sa clémence et sa bonté, de donner au digne magistrat qui n'est plus, un successeur aussi juste, aussi éclairé, aussi digne de la confiance du faible et de l'innocent.

Chez nous, Messieurs, où la plus sainte et la plus glorieuse des révolutions a fait, de provinces pauvres, de colonies faibles, qu'opprimait une métropole aussi injuste que riches et puissante, des états libres, indépendans et souverains, qui, unis par une constitution, chef-d'œuvre de la sagesse humaine, ont pris un rang élevé parmi les nations les plus civilisées et les plus florissantes de la terre; chez nous, où, grâce à la philanthropie éclairée et au patriotisme, aussi pur que brûlant, des immortels fondateurs de la plus grande et de la plus puissante des républiques des tems anciens ou modernes, l'homme de notre race est élevé à la hauteur de toute la dignité naturelle de son être, et, citoyen, ne connaît d'autre maître que Dieu et la loi! qui bénirons-nous, lorsque la balance de la justice aura été confiée à des mains pures qui l'auront si long tems tenue sans la faire pencher, sciemment une seule fois en faveur de l'arbitraire ou de l'iniquité? à qui adresserons-nous nos vœux pour que le juge irréprochable qui a cessé d'être, soit remplacé par un juge qui mérite autant que lui notre estime, notre confiance et tous nos respects?

Ah! si toutes les passions, excepté l'amour sacré du salut public, étaient étrangères du cœur des hauts fonctionnaires auxquels notre pacte fondamental a confié le pouvoir aussi redoutable que séduisant, de nommer à tous les emplois; si les emplois pouvaient n'être jamais donnés qu'à ceux qui, par leurs lumières, leur zèle, leurs vertus et leurs talens, sont le plus dignes d'y être appelés; nous pourrions, Messieurs, rester sans alarme pour notre avenir. Mais — pardon! Je sens que la parole, en s'échappant, pourrait prendre le caractère d'une censure qui est loin, oui, bien loin de ma pensée.

Si les dépositaires de l'autorité n'étaient pas aussi fréquemment obsédés, circonvenus, sans que l'artifice des sollicitateurs laisse à leur faiblesse toute humaine, la faculté de s'apercevoir que, loin de n'agir que selon les lumières de leur raison, ils cèdent presque toujours à une influence étrangère intéressée; si, lorsque nous sollicitons nous-mêmes pour nos amis, ou lorsque nous exerçons notre précieux droit de suffrage, nous étions assez véritablement dignes du noble titre de citoyen dont nous aimons tant à nous parer, pour ne consulter jamais que l'intérêt de la chose publique; nous aurions peut-être le droit d'être sévères, inexorables même, en voyant que les mandataires du peuple ne font pas toujours tout ce que le bien général nous semble réclamer. Mais, hélas!!!

Oh! abstenez-vous de toute réflexion que la charité chrétienne peut nous interdire; et adressons nos plus ferventes prières à l'Eternel

auteur de tout bien, pour qu'il lui plaise nous pénétrer tous chaque jour d'avantage, de la nécessité de nous dépouiller, quand il s'agit de l'intérêt public, de toutes nos predilections personnelles; et de rallumer au fond de nos cœurs, cet amour de la patrie sans lequel il n'y a ni citoyens ni republique. Remercions-le d'avoir si heureusement inspiré d'abord, l'illustre Thomas Jefferson, quand George Mathews, fut commissionné Juge de la Cour Supérieure du Territoire d'Orléans; puis le Gouverneur et le Senat de l'Etat de la Louisiane, lors-qu'ils appelèrent ce juge intègre au siège de notre Cour Suprême. Demandons, à ce même Dieu tout-puissant, de nous donner une nouvelle marque de sa protection, en inspirant à notre vertueux Gouverneur actuel et à notre honorable Sénat, un choix qui, tout en justifiant la confiance dont le peuple les a investis, nous empêche de sentir chaque jour plus vivement la perte que nous avons faite.

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## No. II.

### CASE STATED.

ON the 14th of June, 1723, Boisbriant, the chief judge of the Council established to regulate and govern the affairs of the Compagnie des Indes, and the Commandant of all the French territory north of the Arkansaw river, granted in fee simple to Philip François Renaut, Director-general of the mines of Louisiana, several parcels of land within that jurisdiction, which grant was signed and countersigned by Des Ursins, one of the provincial Council, also an officer of the Compagnie des Indes, and secretary of the government of the commandant general Boisbriant, and is as follows:—

“ L'an 1723, le 14 Juin, accordé à M. Renaut en franc aleu, pour faire ses établissemens sur les mines.

Une lieue et demie terrain, en face sur le petit Maramac, y dans la rivière de Maramac, y a l'endroit de la première branche, y ici conduit au cabanage, nommé Cabanage de Renaudière, sur six lieues de profondeur, la rivière faisant le milieu du rhumb de vent et la rivière au plomb jusqu'où le sieur Renaut a son fourneau et delà droit a l'endroit nommé la Grande mine.

Une lieue de face à Pimiteau, dans la rivière des Illinois, vis-à-vis à l'est et tenant au lac qui porte le nom du village, et de l'autre, aux côtés vis-à-vis le village à une demi-lieue au-dessus, sur cinq lieues de profondeur le rhumb de vent suivant la rivière des Illinois, en descendant d'un côté et en montant par celle de d'Arcsey, qui en fera le milieu dans le reste de la profondeur.

Deux lieues de terrain sur la mine appelée la mine de M. Lamothe;

la face regardant le nord-est; la prairie de ladite mine faisant le point milieu de ses deux lieues.

Une lieue de face sur le Mississipi à l'endroit appelé le Grand Marais, tenant d'un côté aux sauvages Illinois établis auprès du Fort de Chartres, sur deux lieues de profondeur; cet endroit étant l'emplacement icelui, a été accordé pour fair des vivres et en pouvoir fournir à toutes les habitations qu'il fera sur leurs mines. Le jour et an que dessus au Fort de Chartres."

## TRANSLATION.

Year 1723, June the 14th, granted to Mr. Renault, in freehold (*en franc alevu*), in order to make his establishments upon the mines:—

A league and a half of ground in front upon the little Maramac, and on the river Maramac, at the place of the first fork, which leads to the cabins, called the *Cabanage de Renaudière*, with a depth of six leagues, the river making the middle of the point of compass, and the small stream being perpendicular, as far as the place where the Sieur Renault has his furnaces, and thence straight to the place called the Great Mine.

One league in front, at Pimiteau, on the river Illinois, facing the east, and adjoining to the lake bearing the name of the village, and on the other side, to the banks opposite the village, half a league above it, with a depth of five leagues; the point of compass following the Illinois river, down the same upon one side, and ascending by the river of Arcary, which forms the middle through the rest of the depth.

Two leagues of ground on the mine called the Mine of Mr. Lamothe; the front looking to the northeast; the prairie of the said mine making the middle point of the two leagues.

One league fronting on the Mississippi, at the place called the Great Marsh, adjoining on one side to the Illinois Indians, settled near Fort de Chartres; with a depth of two leagues; this place being the situation which has been granted to him for the raising of provisions, and to enable him to furnish them to all the settlements he shall make upon the mines.

The day and year above written, at Fort de Chartres.

BOISBRIANT.

DES URSINS.

The several objects called for in the concession, are susceptible of a clear and exact definition and identification.

The Merimac river still bears that name, and the cabins, furnaces, etc. are laid down upon a map made by the celebrated engineer Diron, commencing at New Orleans, in 1717, and completed by an accurate Chart of Illinois, in 1724.

The second tract granted is upon a lake or enlargement of the river Illinois known since the first Chart of Illinois, in 1687, as the lake Pimeton, because the tribe of Indians living there, were known as the Pimitoniis or Peourrias.

In five French maps deposited in the archives of France, it is always designated as Pimitoni or Pimiteau, in softening the Indian into a more pleasant French word. The tribe of Indians are always designated as Pimitoniis or Pecourrias, which latter word, with a little change, has now been applied to the lake and village, and bear the name of Peoria.

The position of the mine de Lamethe is designated in these maps, and is named after the person who discovered it. The centre of the small prairie and the extent of French leagues at that day, will give the exact boundaries of that grant.

The last portion granted calls to adjoin the "Sauvages Illinois," near Fort Chartres, and as the fort and line of the Indians are also designated upon an authentic carte made under the orders of the French government, these lines can all be identified.

Renaut had possession of all these lands, and sold and conveyed a part, with the sanction and concurrence of the French authorities, in 1740. In 1754, he left Illinois, on account of ill health and with intention to carry out more operatives, and was detained in France until his death, in 1755, leaving five minor heirs.

The *locus in quo* where these are situated was the theatre of wars civilised and savage, and of political changes down to the period of the Louisiana treaty, in 1803.

In 1807, the heirs of Renaut presented their title to the commissioners of the United States, and in 1810, a favorable decision was made by the commissioners, and in 1817 and 1828, bills were reported in Congress for its confirmation. The title was given by Boiesbriant, Commandant of the province of Illinois, and specially commissioned to govern and regulate the affairs of the Compagnie des Indes.

There was also an official letter of the Commandant at New Orleans, recommending any grant that so valuable and respectable a citizen might desire. The grant was made as above stated. The heirs and assignees of Renaut submit the following questions to the Hon. Joseph M. White for his legal advice and opinion:—

Have the heirs of P. F. Renaut a valid subsisting title to the lands in question?

Has it been affected by the laws of nations, treaties, or local laws since 1755?

Can an action of ejectment be maintained upon it in the United States, if Congress do not act upon the subject?

#### ARGUMENT AND OPINION; WITH A PRELIMINARY HISTORICAL EXPOSITION.

The treaty of the Pyrenees, in the commencement of the reign of Louis XIV, terminated a sanguinary war between France and Spain. The two treaties of Munster and Westphalia had reconciled in a great measure the contests for empire, and pretensions to dominion among the Northern Powers of the European continent. These

events, with the termination of the political revolutions in England, consequent upon the decapitation of Charles I, and the restoration of Charles II, gave to Europe, for a few years, comparative repose. Armies were disbanded in the north and south, and the people of these countries devoted themselves to the pursuits of commerce and agriculture.

The troubles preceeding the union of England, Ireland, and Scotland, with the contests produced by the Reformation, delayed the execution of any enlarged plans of colonisation after the discovery of America. The greatest progress was made by Spain and Great Britain in the latter part of the seventeenth, and the commencement of the eighteenth centuries. The pugnacious propensities of Louis XIV involved France in other foreign wars, prevented an impulse being given to colonisation in the transatlantic possessions of France until after the Peace of Ryswick, and after the more important negotiation of the Treaty of Utrecht.

Before this general pacification, a feeble effort was made by a royal grant, in the latter part of the reign and life of Louis XIV, to Sieur Antoine Crozat of the exclusive commerce and a portion of the mines of Louisiana. This royal concession recites that, in the year 1683—"We gave orders for the discovery and exploration of the lands situated between New France and New Mexico, for establishing a colony and supporting a garrison there, which has kept and preserved the possession we had taken of the lands, coasts, and islands which are situated on the Gulf of Mexico, between Carolina on the east, and New Mexico on the west."

The Sieur Crozat, finding himself incompetent to execute the stipulations of his contract imposed by the concession, solicited the French government to allow him to surrender it, which was agreed to by an order in council of the 23d of August, 1717. The commercial privileges and mines were abandoned by him and retroceded to the crown. Louis XIV died September 1, 1715. The successor to the crown. Louis XV, was then only five years of age; the Duke d'Orleans was appointed Regent during the minority of the infant monarch. Contemporaneously with these events appeared in France the celebrated John Law, descended from the illustrious family of the Duke of Argyle, in Scotland, and one of the most remarkable men in all respects of the age in which he lived. A man of commanding person, fascinating manners, of great wit, and uncommon learning upon all subjects connected with political economy and finance—subjects but little understood at that day in Europe. Two wars of twenty-six years' duration, with the extravagance and folly of the brilliant and corrupting reign which had just terminated, left the country and government of France without the restraints of the ancient and powerful authority of a haughty and absolute monarch, abandoned to the cupidity and ambition of the legitimate and illegitimate princes who claimed to control public affairs during the minority of the young king. The selection of ministers, with the influence of the effeminate

nobility and courtiers after the time of Colbert, had inflicted greater injuries upon the country and its finances than the war itself.

The nation was burdened with debt, the people oppressed with taxes, forced loans resorted to, and advances made to the king out of his own funds by the *gens d'affaires*, at exorbitant interest. The Ministers knew nothing of exchange, credit, and banking. The finances were deranged by rash experiments of ignorant and presumptuous projectors, until the question was seriously discussed whether the nation should be declared bankrupt, and all creditors, foreign and domestic, defrauded and sacrificed.

It was at this period Law appeared, after having written several works upon credit, banks, banking, and finances in Scotland, and after having examined in person the operations of the banks of England, Amsterdam, and Venice. He was a man of large private fortune, and his commanding genius recommended him to the Regent as a statesman upon whom he could rely in such a crisis. Law established his Bank of Circulation in 1716. He founded the "*Compagnie d'Occident*" in 1717. In 1718, his individual bank was converted into a "*Banque Royale*." In 1719, the *débris* of the "*Compagnie des Indes Orientales*," established by Colbert, was united with the "*Compagnie d'Occident*," and took the general name of the "*Compagnie des Indes*" (India Company.) The Banking Company and the India Company were both placed under the control in some measure of the government, and it was through the agency and by the exigency and necessities of the Regent and his ministers, that such excessive issues were made of the *actions* of both establishments, which caused the explosion for which Law himself was persecuted and denounced in France.

The "*Compagnie d'Occident*" was one of the creations of his genius, founded upon the magnificent conception of colonising the whole of that immense country, from the Gulf of St. Lawrence to the Gulf of Mexico, from the Carolinas on the east, to the Pacific on the west, now covering the territory composing the Canadas and States of Michigan, Illinois, Missouri, Arkansas, and Louisiana, as it existed before the secret treaty of 1762 between France and Spain.

The "*Compagnie d'Occident*" were created by "Letters Patentes" in form of an edict, in August 1717. The privileges and concessions made to it, were enlarged by the royal order uniting the two companies.

This ordinance recites various causes for its creation, such as the desire to establish a commerce with the French colonies in Louisiana and Canada. It recites the surrender by Crozat of his privilege of exclusive commerce, and the expiration of a charter granted to a Fur Company in Canada in 1706, and is established upon the following basis:

The First Article creates the Company, and declares that the nobles of whatever rank or quality, might take an interest for such a sum as



they should judge fit, without being considered as having, by reason of such engagements, derogated from their titles and dignity.

The three succeeding Articles are commercial.

The Fifth Article is as follows, in French. "Pour donner moyen à ladite Compagnie d'Occident, de faire des établissements solides, et la mettre en état d'exécuter toutes les entreprises qu'elle pourra former, nous luy avons donné, octroyé et concédé, donnons, octroyons et concédons par ces présentes à perpétuité, toutes les terres, costes, ports, havres, et isles qui composent nostre province de la Louisiane."

"To enable said Company of the west to make permanent establishments, and to put it in a condition to execute all the enterprises it may project, we have given, granted, and conceded, and we give, grant, and concede to it, by these presents, in *perpetuity*, all the lands, coasts, harbors and islands, which compose our Province of Louisiana."

The Sixth authorises treaties with Indian nations, by the Company.

The Seventh grants all the mines and minerals, without their being held to pay to the crown the part reserved in the grant to Crozat.

The Eighth Article declares, that "The Company may sell and alienate the lands of the concession, as they think proper, and may grant them in fee simple ('*franc aleu*'). "We do not intend to dispossess those of our subjects, who are established in the country, on lands which have been conceded to them, or of those without concession, where they have commenced to render them valuable—we wish that those who have no grants, or '*Lettres patentes*' from us, may be required to take concessions from the Company to assure themselves of their right to the lands they possess, which concessions shall be made to them gratuitously."

Article Ninth. "The Company may construct forts, &c. for the defence of the country we have conceded to it."

Article Tenth. "The Company may establish governors, and other superior officers as they may judge fit, which shall be presented to us by the directors, for our commissions; they may dismiss them and establish others."

Article Thirteenth. "The said Company as Lord High Justiciaries in the country conceded to them, may establish judges and other officers whenever they may deem it necessary, and to depose and replace them."

All the other articles down to the Fifty-Second, relate to commerce, privileges, exemptions, securities, stocks, forts, imports, exports, &c.

The Fifty-Second Article declares that, if at the expiration of its commercial privileges (25 years) "We do not think fit to grant a continuation of it, all the lands, islands, &c. which they shall have granted, inhabited, or caused to be inhabited, shall remain for ever in full right and property as its own, without reserving to ourselves the right to retake the lands, for any cause, occasion or pretext whatever."

The last article annuls all arrears, edicts ordinances and laws, in-

consistent with the "Lettres Patentes," and directs their registration in Parliament.

These were the leading articles of an ordinance dictated by Law, to create an empire for France in America, and to supply from the mines of that continent, enough of gold and silver to support that system of banking which he had introduced into France, upon sound and solid principles.\*

The bank, however, having been made a treasury or *Exchequer* establishment, exploded, as might have been expected, from the condition in which France was, as it was wielded for the benefit of the government, separated from commerce and the people. Law, in one of his letters to the Regent, displays his profound knowledge of government and human nature. He says that a bank can better be sustained in a monarchy than in any other form of government, where it has the *protection*, and is not under the control of the king, as it will be free from the agitations of popular excitement, and the temptation in great exigences in popular governments, to seize upon the resources, revenues, and finances of the country. The monarchy having more means at its disposal to sustain itself, will not be so readily forced by necessity to put its hands into the public purse, or to protect itself by a total separation of its affairs from that of the interests and currency of the population. His plans and projects, however, were in advance of the age in which he lived, and from the moment the necessities of the government forced such an issue of the bank and of the *actions* of the "Compagnie d'Occident," a failure was the consequence, and it was much easier for public indignation to pursue a private individual, than the Regent, as the banking-house could be destroyed with greater facility than the Palais-Royal. Law had a large fortune, and by a popular tumult which could drive him from the country, an opportunity would be afforded of plundering his individual revenues.

The "Compagnie d'Occident" though much embarrassed by this financial explosion, continued its operations. The powers granted to it, as it will have been seen by the analysis of its charter, embraced every thing but a nominal sovereignty of France over the colony. It had the unconditional grant of all the lands, mines, and minerals, appointments of all its officers, civil, military, and judicial.

For the first time, it was declared by a royal edict, that it should not be *derogatory* to the nobility to engage in banking, stocks, commerce, and the ordinary pursuits of life. The great object of Law was to induce, by the allurements of interest, and the prospects of fortune in a new world, the indolent nobility, to devote themselves to useful employments.

Few could be stimulated by the royal dispensation, or the other more noble consideration, to accept grants from the "Compagnie."

\* This grant was similar to that made by Holland, in 1621, of the colony of New York, that of Spain of the province of Venezuela, and of Great Britain of several of the North American colonies to commercial and other companies.

Persons of enterprise and character, such as Law himself, took concessions, and incurred great expenses in sending out colonists.

The governors of districts and commandants of posts were authorised to concede lands in the colony. There was greater difficulty experienced by the company in France, and its officers in Louisiana, in finding persons to accept concessions, than there was on the part of those applying to obtain them. The great object of that edict, as manifested in all its parts, was to obtain population, and encourage commerce and agriculture.

In the year 1725, after the union of the two companies "*des Indes Orientales et d'Occident*," a royal edict was promulgated at Versailles, and enregistered in parliament, "*portant confirmation des privilèges accordés, concessions et aliénations faites à la Compagnie des Indes*." The first article declares "*que la Compagnie des Indes créée sous le nom de Compagnie d'Occident par nos Lettres Patentes du mois d'Août, 1717, jouisse à perpétuité des concessions et privilèges que nous luy avons accordés*."

"The Company of the Indies created under the name of the Company d'Occident by our letters patent of August, 1717, shall enjoy in perpetuity the concessions and privileges we have accorded to them."

The accession of the lands of Louisiana and a confirmation of their title are made in a subsequent article.

It is, then, incontestably demonstrated that the "*Compagnie des Indes*" by itself and its officers in the colonies, had as perfect a right to grant lands in fee simple, as the king himself, and that all grants, sales, and concessions made by it and its officers, were as valid as titles having the sign manual of the king, or as patents executed by the President of the United States in pursuance of law.

The company, in the exercise of their rights under these royal edicts, by themselves, in their deliberations in general assembly of their administration at Paris, and by the agency of their officers in Louisiana, continued to grant wherever they could find new settlers, until the 22d of January, 1731. It appears by the register of deliberations on that day, in the office of the Minister of Marine and Colonies in Paris, that they had expended during the fourteen years of their existence, twenty millions, "*dans la vue de soutenir le commerce de la colonie de la Louisiane, d'augmenter et de perpétuer les différentes cultures et plantations qui pouvoient s'y faire, et de la fortifier à cet effet en peu d'années d'un nombre suffisant de nouveaux colons*," etc.

They proceed in that deliberation to represent that, considering the extent of their grant "*de la dite colonie, et les pays sauvage Illinois*," and in consequence of the war with the fierce and savage tribe of the Natchez Indians, it was resolved that, the Syndic and Director of the Company should propose a retrocession of the colony "*ensemble du pays des sauvages Illinois, remettre entre les mains toutes puissantes de sa majesté*."

On the 23d of January, 1731, the retrocession was agreed to, and

on the 24th, the jurisdiction and title of the "Compagnie des Indes" over all the lands not granted by them, was abandoned to the crown. This cession by the Company was of the ungranted lands of the colony, as it was not competent for them to retrocede what had been granted to individuals.

France continued in the exercise of ownership, jurisdiction, and sovereignty, until the year 1762, at which epoch, a preliminary convention was entered into at Fontainebleau, by the Duke de Choiseul, Minister of France, and the Marquis de Grimaldi, Ambassador of Spain, for a cession of Louisiana to Spain, in which it is stipulated that "The most Christian King has, accordingly, authorised his Minister, the Duke de Choiseul, to deliver to the Marquis de Grimaldi, the Ambassador of the Catholic King, in the most authentic form, an act, whereby his most Christian Majesty cedes in entire possession, purely and simply, without exception, to his Catholic Majesty and his successors, in perpetuity, all the country known under the name of Louisiana, as well as New Orleans, and the island in which that place stands."

This convention was accepted by the Spanish Ambassador *sub spe rati*.

The King of France, in a royal proclamation, makes known the acceptance of the King of Spain, reciting that the convention had been entered into by his orders to give "the Catholic King, our brother and cousin, a new testimonial of our tender friendship, of the strong interest we take in satisfying him, and promoting the welfare of his crown, and of our sincere desire to strengthen and render indissoluble the bonds which unite the French and Spanish nations."

The King of Spain, by a royal order, given at San Lorenzo El Real, on the 13th of November, 1762, accepts the cession in the following terms:—

"Therefore, in order to establish between the French and Spanish nations the same spirit of union and friendship which should subsist, as they do in the hearts of their sovereigns, I, therefore, take pleasure in accepting, as I do accept, in proper form, the said act of concession, promising also, to accept those which may hereafter be judged necessary for carrying it into entire and formal execution, and authorising the said Marquis de Grimaldi to treat, conclude, and sign them."

It is hardly necessary here to state that, from the year 1731, when the India Company surrendered its grant, to the year 1762, when the province was ceded to Spain, that all the grants made by that Company were respected by the French authorities, and that a large portion of the titles in the vicinity of New Orleans, Vincennes, Kaskaskia, and Detroit, are to this day held under these concessions. In a large number of cases the papers themselves have been lost by time and accident, and, indeed, their preservation was not considered of any moment after the passage of the act of Congress subsequently to the acquisition of Louisiana, declaring that all claims to land, upon

proof of ten years' possession without written evidence, should be confirmed.

By the definitive treaty of peace of 1763, the cession from France to Spain was confirmed in the terms in which the cession has been recited. It will be observed that neither in the original convention at Fontainebleau, on the 3d of November, 1762, nor in the act of acceptance and ratification, at the Escorial, the 13th of November of the same year, nor in the confirmation of the cession afterwards, is any reference whatever made to the titles to land of the inhabitants of the province of Louisiana. The King of France in his orders given at Versailles the 21st of April, 1764, addressed to Monsieur Dabadie, says:—"By a convention made, etc., I ceded of mine own free will to my dear and well-beloved cousin, the King of Spain, in perpetuity, purely and simply, and without exception, all the country known by the name of Louisiana."

The King of France proceeds:—"I promise myself from the friendship and affection of his Catholic Majesty, that he will give orders to his governors, etc., that the inhabitants may be kept and maintained in their possessions, that they may be confirmed in the ownership of their property according to the grants that may have been made to them by the governors and ordonnateurs of the colony, and that the said grants be considered, reputed, and confirmed by his Catholic Majesty, although they might not have been confirmed by me."

Here a question of some magnitude arises, upon the new relation created by this cession of a province, without any provision for the rights of property of the ceded inhabitants. Does a treaty, importing an absolute transfer of a province, without regard to individual proprietorship, place at the mercy of a sovereign acquiring, the right to dispose of the persons and property of the inhabitants? It is important, upon so grave a question of international law, to inquire whether it is competent for one sovereign, when forced by public necessity, or induced by the voluntary capricious exercise of royal authority, as in the case stated, to deprive his subjects of their possessions. This question depends first, upon the law of nations, which is composed in fact of the usages of nations, which are liable to perpetual change, and which rest upon the maxim, "*quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*" As this natural reason depends upon the moral sense and principles of justice of ministers and princes, it follows, that such a code is liable to change in some respects, every half century, according to the prevailing interests and policy, or force, fraud, and power of nations. There are, however, certain admitted fundamental maxims of general law, founded upon established systems of Ethics, and sanctioned by such general usage, that they have in some measure constituted a code, or common law of political action. There are also the particular municipal codes of all countries, which prohibit the sovereign, even in cases of extreme necessity, from appropriating the property of the inhabitants without adequate remuneration.

It may be said that there is not a code in Europe in which that principle, in some form or to some extent, has not been incorporated.

It is conceded, that in cases of conquests, where a state or its provinces have been destroyed by force of arms, and where to secure the subdued territories the conqueror has required allegiance or expulsion, the rule is different from amicable cession. But even there it is unusual to do more than to displace the sovereign, and confiscation absolute, or qualified, is very rarely ever resorted to. It is believed to be well established, however, that in amicable cessions of territory the principle is universally admitted and acted upon, to respect and protect private property.

The laws of nations regulated by the usages and practices of nations, and by treaties, often the result of the inability of the weak, and the power of the strong, must, in some measure, depend upon speculative political notions of right and wrong in different ages of the world. A century gone by in the transcendental notions of sovereign power, then too common among the nations of Europe, especially about the period of the reign of Louis XIV, the king was considered every thing and the people nothing. Since that time, Charles I of England and Louis XVI of France, have lost their heads, and the houses of Stuart and the line of Bourbon aîné, have been driven from the thrones of their ancestors. The American revolution too, has established a principle as an example to nations, that the people, their lives, liberty and property, are every thing, and the government nothing in comparison. From the year 1762 to the present day, the question must be considered as definitely settled, that in cases of amicable cession of territory, the property of the inhabitants must be regarded as sacred. By the treaty of 1763, Cuba was surrendered to Spain in exchange for the Floridas; the pre-existing titles in both countries were respected and confirmed. Louisiana was transferred to Spain and Canada to Great Britain, and there is not an instance in which private property was disregarded or confiscated. After the American revolution, though the treaty of peace of 1783 contained no provision for the titles of British subjects, and even alien enemies, the principle was considered so obviously just; that in a treaty of 1794, we acknowledged all titles of British subjects to lands in the United States, made when they were colonies. In a more recent instance, the titles of the inhabitants of Trinidad have been maintained by an English court without treaty stipulation, upon the principles of the laws of nations.

Neither the treaties nor the decisions of Great Britain, however, are considered the safest and soundest expositions of international law upon subjects of individual rights, as the doctrine of alienage and allegiance are carried to a greater extent by their peculiar code and constitution, than in any other country. There is not an instance, however, on record, in which Great Britain, by any act of parliament or order in council, has attempted to deprive the inhabitants of a conquered or ceded territory, of their rights of property. The two

cases of Canada and Trinidad are exemplifications of this fact, to which we may add that of the Floridas, in all of which Great Britain recognised all the pre-existing Spanish titles.

In the conquests of Napoleon, of Holland, Germany, Italy and Spain, the individual property of the inhabitants in the soil, according to the laws and usages of the country, have never been made a question, nor deemed worthy of negotiation. In the year 1800, Louisiana was retroceded by Spain to France, and no provision or article was inserted relating to the property of the inhabitants. The king of Spain, however, used almost the same language which was employed by the king of France in his letter to governor d'Abadie.

In a royal despacho given at Barcelona, 5th of October, 1802, for the delivery of the province, he declared that "The inhabitants shall continue in the peaceful possession of their property. All grants made by my governors, by whatever denomination, shall be confirmed, etc., etc." (White's Spanish Laws, p. 162.)

In 1803, the colony was ceded by the first consul Napoleon to the United States, with a general reservation of the rights of private property. Private property has been defined to be titles legal and *equitable* by the supreme court, and the rights of either French or Spanish inhabitants would have been held equally sacred by the laws and usages of civilised nations without treaty stipulation.

Soulard's case, 4 Peters.

Percheman's case, 7 Peters.

Immediately after that treaty, boards of commissioners were organised for the ascertainment of private property in upper and lower Louisiana, and in every act of congress upon the subject, the French and Spanish titles are put upon the same footing in all respects. In the whole region composing Louisiana, as it was held from the organisation of the "Compagnie d'Occident," in 1717, to the final transfer of the *last* portion of it to the United States in 1803; there has been no law relating to titles in which provision is not made for the confirmation of French grants and concessions. These titles at Detroit, Kaskaskia, Vincennes and New Orleans in every case where the quantity was under the jurisdiction of the commissioners, were confirmed. This may be considered conclusive evidence of the legislative construction of the various treaties on the subject. By all the acts of congress, confirmatory of reports, the principle has been established and acted upon.

In addition to these public acts of executive and legislative construction, the courts of the United States have recently been called upon to pronounce more authoritatively on the subject. Whatever may have been the speculative opinions of writers upon abstract principles of international and general law, so far as the United States are concerned, the judgment and opinion of the highest judicial tribunal of the country has established principles as permanent as the government itself.

The Supreme Court, in the case of Arredondo and others, against

the United States, in 6 Peters' Reports, say, that they "will decide whether the lands in controversy were the property of the claimants before the treaty, and if so, that its protection is as much guaranteed by the laws of a republic as the ordinances of a monarchy." The court further proceed to say, at page 717, that the principle by which a title is to be tested, is, whether by the laws of the province it "was property at the time the treaty took effect." Chief Justice Marshall, in delivering the unanimous opinion of the court, in the case of *Juan Percheman*, 7 Peters, holds this language. "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right, which is acknowledged and felt by the civilised world, would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed." If this be the modern rule, even in cases of conquest, who can doubt its application to a case of amicable cession of territory?

Had Florida changed its sovereign, by an act containing no stipulation respecting the property of individuals, the right of property, in all those who become subjects or citizens of the new government, would have been unaffected by the change. It would have remained the same as under the ancient sovereign.

The language of the second article conforms to this general principle: "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, by the name of the East and West Florida."

A cession of territory is never understood to be a cession of the property belonging to its inhabitants.

The king cedes only that which belongs to him. Lands he had previously granted were not his to cede. Neither party so understood the cession. Neither party could consider itself as attempting wrong to individuals, condemned by the practice of the whole civilised world.

Let us apply the doctrine here established by that enlightened Court, in the luminous opinions of Justice Baldwin and the late lamented and illustrious Chief Justice Marshall, to the treaties of 1762 and 1763. "A cession of a province is never understood to be a cession of the property of the inhabitants."

Spain did not obtain possession of Louisiana until 1769 and then only by force of arms. It may then be asserted with confidence, as an incontrovertible historical fact, that, during the Spanish domination, the French grants were regarded as valid titles.—Whatever discussion might have arisen as to the application of the law of nations, the legislative and judicial action of the Government of the United



States, must be considered as having removed all disabilities and is decisive of the American interpretation of these treaties.

If, then, by the Executive and legislative proceedings of the Government of the United States and the judicial decisions of its courts in all the most considerate and solemn legislation, and mature judgments upon the treaties and laws of nations applicable to these cessations, it has been established and adjudged that the property of the inhabitants is unaffected by the change, we must look upon every title of French or Spanish claimant made by a competent authority under the Government of Great Britain and the United States as standing upon the same footing with grants from the Crown to British subjects, and patents from the President of the United States to American citizens.

The question then arises whether the United States can by any law requiring registration, presentation to Commissioners, or in any other manner declare a forfeiture of a title thus situated. Is not this property equally under the protection of the Constitution of the United States?

The judges of the court say, in the case of *Arredondo*, that they "will inquire what was property when the treaty took effect, and that its protection is as much guaranteed by the laws of a Republic, as the ordinances of a Monarchy."—If it then be admitted as it is conceived to be incontestably established, that the titles of property of the French inhabitants were not impaired or destroyed by the cession to, and retrocession from Spain, nor by the treaty of Louisiana of 1803, it follows that their titles, thus guaranteed and protected, cannot be affected by legislation in any other manner than the Constitution and laws allow, in regard to patents from the President.

In the case before referred to, of the United States and Percheman, 7 Peters, page 88, the Supreme Court say, "Without it (the treaty) the titles of individuals would remain as valid under the new government as under the old, and those titles, so far at least as they *were consummate*, *might* be asserted in the courts of the United States independently of this article."

The treaty declares that the grants "shall remain ratified and confirmed to the persons in possession of them" (the titles), thus conforming to the universally received doctrines of the laws of nations. "The United States could have no motive in insisting on the interposition of government, in order to give validity to titles, which according to the usages of the civilised world were already valid." The enlightened opinion of that excellent man, and learned judge, the late Chief Justice Marshall, concurred in unanimously by every member of the bench of the Supreme Court, must now be considered the established law of the land in the United States. This decision does not leave proprietors of lands, where titles are derived from foreign governments, at the mercy and discretion of Congress.

The first treaty, however, that was entered into with France, and

which still subsists as a monument of the justice and reciprocal goodwill of the two nations, contained the following article:—

“Traité du 6 Février, 1778; Art. XI.

“Les sujets et habitans desdits Etats-Unis, ou de l'un d'eux, ne seront point réputés aubains en France, et conséquemment seront exempts du droit d'aubaine ou autres droits semblables, quelque nom qu'il puisse avoir; pourront disposer par testament, donation, ou autrement, de leurs biens, meubles et immeubles en faveur de telles personnes que bon leur semblera, et leurs héritiers, sujets desdits Etats-Unis, résidans soit en France ou ailleurs, pourront leur succéder, *ab intestat*, sans qu'ils aient besoin d'obtenir des lettres de naturalité, et sans que l'effet de cette concession leur puisse être contesté ou empêché, sous prétexte de quelques droits ou prérogatives des provinces, villes, ou personnes privées; et seront lesdits héritiers, soit à titre particulier, soit *ab intestat*, exempts de tout droit de détraction ou autre droit de ce genre, sauf néanmoins les droits locaux, tant et si long-temps qu'il n'en sera point établi de pareils par lesdits Etats-Unis ou aucun d'iceux. Les sujets du Roi Très-Christien jouiront, de leur côté, dans tous les domaines desdits états, d'une entière et parfaite réciprocité, relativement aux stipulations renfermées dans le présent article.”

Treaty of the 6th February, 1778; Art. XI.

“The subjects and inhabitants of said United States, or of any of them, shall not be considered as aliens in France, and shall consequently be exempt of the right of escheat to the crown (‘droit d'aubaine’) or other similar rights, under whatever denomination; they shall have the right to dispose, by testament, donation, or otherwise, of their property, movable or immovable, (real or personal,) in favor of such persons as to them will seem fit, and their heirs, subjects of the said United States, residing in or out of France, shall inherit, *ab intestate*, without the necessity on their part, to obtain letters of naturalization, and without the effect or result of this concession or privilege, being contested to, or withdrawn from, them, under the pretext of certain rights or prerogatives for the provinces, cities, or private persons. And the said heirs, either from a particular title or *ab intestate*, shall be exempted from all duty of *detraction* or any other of the same kind, saving, however, the local duties or rights, as long as similar ones shall not be levied or imposed by the said United States, or either of them, the subjects of his Most Christian King, shall also enjoy in all the domains of the said States, an entire and perfect reciprocity in relation to the stipulations contained in the present article.”

This treaty, of course, supersedes all the acts of congress or state laws, which infringe in any degree its provisions, and destroys all pretensions founded upon the absence or alienage of the heirs of Renault, and refutes any claim to forfeiture under any pretext whatever. The articles above recited preserving, and the Louisiana Treaty

confirming, private property, would seem to be conclusive upon the rights of all French inhabitants.

The *quo modo* of executing these treaties has been the only matter of discussion in the United States.

Whenever such questions have gone before the courts, the rights of individuals have been preserved with the most fearless impartiality and upright integrity. The constitution of the United States in the organisation of the government, has with a sagacity and foresight for which its authors were distinguished, provided against passions and prejudices local and national, that might disturb the administration of justice, by giving jurisdiction to the federal courts in all cases in which aliens and citizens of different states are parties. The constitution has provided a tribunal for aliens, and for all questions arising under the constitution itself, treaties and laws of nations, and the twenty-fifth section of the judiciary act of 1789, gives a writ of error from judgments rendered in state courts, where questions of this description are involved, or may arise.

In the case before referred to, the decision pronounced, affirms the principle, that, upon "all titles consummated," under foreign governments, an action of ejectment may be maintained. Without the recognition of such a principle, the government of the United States arrogating to itself an odious prerogative, incompatible with justice, and destructive of rights of property, as well as abhorrent to the genius of a republic, would deny to a foreigner the investigation of his rights in courts organised by the government itself, and designed by the constitution to be their shield and protection.

In the case of *Percheman*, a still more odious prerogative was feebly claimed, but discountenanced by the court, by a declaration that it was *impossible* that it could be seriously contended for. In the court below it had been insisted, that as the title of *Percheman* was not presented to the commissioners, according to law, that the title was, by the act of congress, forfeited. The court dispose of this question by a declaration that a board of commissioners for the ascertainment of titles, is only instituted *for inquiry*, and that they are not a "court exercising judicial power," and cannot decide finally upon titles. It is further considered by the court, that the provision declaring a title void for a failure to present it to the commissioners, can only mean that it shall be held so by the commissioners. "It is impossible to suppose that congress intended to forfeit real titles." The position was considered so untenable, that the attorney-general did not insist upon it in argument. If such a monstrous proposition had been seriously maintained, there is no question that, instead of the language employed of the *impossibility* of such an intension of the legislature in the passage of such an act, the court would have declared in the most explicit and forcible manner, that such an attempted forfeiture was unconstitutional and void. If this were not so, it would be in the power of congress, representing the government and people, who are, in fact parties in interest, by an arbitrary law or speedy

prescription, without notice, to vitiate titles valid under the laws of nations and treaties.

It has been shown that the British government in Canada and the United States in all the territories composing the province of Louisiana, have, by law, recognised all French titles, and have confirmed those presented to and reported upon by the commissioners. There are still two other classes.—*First*, those presented to the commissioners, where the magnitude of the title exceeded the quantity that they were authorised to decide upon, and which were reported to congress for further action; and *secondly*, those which were not presented to any tribunal of the United States, either on account of the ignorance of the claimants, their heirs and representatives, or where the country was occupied until within a few years past by the Indians, after the French were driven out and destroyed in the war of 1726, and for some years succeeding.

It is believed that there are very few of these titles—I shall select one of the first class.

In the year 1723, during the period when the “Compagnie des Indes” were in full possession of all the rights conferred by the royal grant of 1717, there was granted to Philippe François Renault, director-general of the mines of Upper Louisiana, and one of the most respectable and scientific Frenchmen who ever entered the province, several tracts of land on both sides of the Mississippi. The grant is as stated in the case submitted.

Philippe François Renault, the “concessionaire” in this case, was a gentleman of the first connections in France, and in consequence of his science in natural history, and particularly mineralogy, was induced, by the “Compagnie des Indes,” to undertake a tour of exploration for them, under promises of the most munificent liberality. The king had, as it will have been seen, abandoned the reserved right to a portion of the mines stipulated for in the grant to Crozat.

The whole was the absolute property of the company, who were exceedingly anxious to grant, or to have them granted to any one who would undertake their exploitation. In the year 1719, in consequence of letters given to Renault upon his embarkation for Louisiana and the perfect understanding between him and the company, he is designated as a “*Concessionnaire*.”

The company at Paris, however, could not designate the tracts which he might select, as that depended upon examinations to be made after his arrival. The commandant-general, Bienville, was the director and agent of the company, appointed upon their recommendation, according to the “*Lettres Patentes*” before referred to.

It was not known in 1719, when Renault set out, whether he might discover mineral lands in Upper, or Lower Louisiana. If he had found them within the jurisdiction of Bienville, they would of course have been conceded by him. When he set out upon an exploring expedition, he took with him a letter of Bienville, expressing the wishes and intentions of the company, and authorising him to make

his locations. It appears that the selection was made after the Illinois was established as a new district, and separated from the jurisdiction of Bienville. This accounts for the concession having been made by Boisbriant, who was commandant, director, chief, and judge of the Illinois, having the entire authority from the crown and company to conduct their affairs civil and military. The history of that period establishes the fact, that the "Compagnie des Indes" offered their vessels, and that the Regent placed at their disposition a large part of the French navy to transport to Louisiana persons to settle the colony. When the charter was surrendered in 1731 to the crown, the records of the company were surrendered to the "Ministère des colonies et marine," to which department the papers, records and archives of the colonies properly appertained.

Among these papers is to be found the register of all the names of artificers, miners and laborers sent out by Renaut to establish a concession. The documents show incontestibly a perfect previous understanding with the company, who deemed it the greatest acquisition to induce Renaut to go out and to accept their grant. It was made by competent officers in pursuance of this previous arrangement. It required therefore no ratification to give it validity. It contained no condition, precedent or subsequent, upon which it might be declared null. It was as full and absolute a title as any the president ever gave in pursuance of an act of congress.

The concessions of the company were of two kinds, absolute and conditional. They were absolute and in fee, when the parties were on the land, or where there was either a confidence that they would be improved without the coercion of a condition, or as a remuneration for services rendered. In all such cases, whether made by the directors in Paris, or by their officers in Louisiana, they were in fee simple, or in *franc aleu*.

Those which were conditional, depending on settlement and cultivation, were made by the officers with these conditions precedent, upon the performance of which the directors or the commandant, either gave or ordered to be given a title *en franc aleu*. The first commission issued after the establishment of the "Compagnie d'Occident," recites that the king in council by article 41st of the "lettres patentes" of August 1717, having authority for the first time only to nominate a director, ("pour régir et administrer,") the affairs of said company, only for the time mentioned, nominates and appoints Sieur Law, "Directeur-Général de la Banque," to whom power is given to govern the affairs of the company. This was a provisory appointment for the organisation of the company.

After the nomination of the first director at Paris the company had power to appoint and remove all officers.

Law ceased to be director in 1719, when the union of the two companies took place, and left France in 1720. It will be observed that the commissions of Bienville and Boisbriant are in the same words—"pour régir les affaires de la compagnie." In referring to

the grants made at Paris, it will be seen that, in nearly every instance, they are issued in the form of an order to the commandant and director in Louisiana, to grant in "franc aleu" to the persons named therein, etc.

These papers were only issued to people in France; those in Louisiana were given at once in "franc aleu" by the local officers. The concessions and their form in France are only referred to for the purpose of showing the perfect understanding of the company, as proved by their own orders, and the universal practice of the commandants granting in "franc aleu." In 1717, Boisbriant, the commandant of Mobile, was appointed commandant-general, in case of the absence of Bienville. In 1718, he was appointed commandant of Illinois. In that year an order was given by the "Compagnie des Indes" declaring that the mines of Illinois shall be under the direction of a council, composed of Boisbriant, commandant, and M. Lallouyre des Ursins, principal secretary. This was followed by a more formal order constituting a provincial council, upon the report of the commissaires of the king in 1722.

In this respect, the "Compagnie des Indes" pursued the policy adopted by Great Britain, Spain, and France in their colonies; in all of which the governors, ordonnateurs, and commandants, representing the king in their respective districts, granted lands, either in fee to meritorious subjects for services rendered, or upon condition to promote agricultural improvement. In the case of Renault, the grant was in fee simple, without condition precedent or subsequent, and invested him, *eo instanti*, with a full, complete, and indefeasible title to the lands described in the grant itself. He was at the time of the concession in possession, having carried with him six hundred persons to Louisiana, and continued the actual possession until 1744, when he departed for France, to carry out his family and a large number of operatives. He was detained by ill health, and died in 1755, leaving five children. This event was followed by the war between France and England, by the American revolution, and successive Indian wars, down to the period of the Louisiana treaty.

Immediately after that treaty, the United States, acting upon the principles before indicated, made provision by law for the confirmation of French titles in Louisiana, Missouri, and Illinois. The various acts and proceedings of commissioners, committees, and congress have been detailed. After twenty-seven years of delay, whilst these heirs were waiting for the tardy justice of congress in extending to them the recognition of their title, depending upon principles established in a hundred other cases of smaller amount, it was again referred to congress. The titles of Renault had been admitted by the confirmation of every title derived from sales made by him. These sales do not stand upon the footing of ordinary transfers, as understood in the United States.

Every sale before a governor or commandant, under the Spanish

government, is equivalent to a judicial sentence, and is, in fact, in all respects, the approval of the title of the grantor. The officers before whom a Spanish bill of sale is passed, are bound to see that the person making it exhibits his title, and that title in the first sale is the grant from the proper officer of the crown. The purchaser takes a notarial copy of the bill of sale, which he exhibits to succeeding vendees in the deraignment of title to the last holder. Concessions upon condition cannot be conveyed, until there is proof of the performance of the condition. In the case of Renault, his grant was absolute; and, by the French laws, that grant was exhibited to the notary as evidence of his right to sell, and it is made the duty of the notary to see that he has a complete *bonâ fide* title.

In all the tribunals of France and Spain, upon a suit to recover possession of lands, what we would call the plaintiff in ejectment, is only bound to exhibit his notarial bill of sale, which is conclusive without deraignment of his title, under their peculiar system.

The United States have admitted Renault's title, by confirming to all who hold under him by assignment; and these sales, made before French notaries, from the year 1723, when the concession was made, to 1744, when Renault left the province, prove that his title was known, recognised, and ratified by their execution and approval.

The claim of the heirs was, however, again presented to congress; where, it is known, that a large title always slumbers, too often because it is large, as it is deemed easier and safer to delay action than to investigate its merits. In this case, in the face of a report of the commissioners in favor of this title, and the confirmation of all those claims derived from Renault, and of two unanimous reports of committees, composed of respectable and able members and lawyers, a new committee, in 1834, made a report adverse to the title. In regard to this report, as far as legal principle is involved or referred to, it is enough to say, that every position and objection in it have been considered, refuted, and overruled by the Supreme Court of the United States in similar cases. The most obvious historical facts are misstated, and charters, documents, laws, and treaties of general notoriety are denied, because not proved before them, under the great seal of France. Even the laws of Missouri and Illinois were unknown to the committee who made the report. They appear to consider themselves authorised to overrule the decisions of the Supreme Court, and to destroy all the principles established by Chief Justice Marshall in similar cases. If any one will read the opinion of the court referred to by them, he will find that they have made an imaginary case upon which to expend their criticism. The opinion commented upon is perverted in all its essential parts, which proves that it was either never read, or never understood by them.

"The committee say, that the grant purports to have been made by Boisbriant and Des Ursins; the first the commandant of the province, and the latter an officer of the 'Company of the West,'

Nothing is known to the committee of this company, nor of the powers of its officers." The report is thus made up of such remarks and statements, when the land-office at Washington furnished evidence of a hundred claims made in the same manner, by the same officers, which were admitted and confirmed by the United States. The royal grant to the *Compagnie des Indes*, has been given in the commencement of this exposition, and will be laid before any other tribunal called upon to act upon this subject hereafter.

The extracts given from the essential parts of the royal charter, will show that all officers of the province of Louisiana, were to be made by the King upon the nomination of the directors of the company. The spirit and object of the grant was commerce and population. This report indicates that for the first time since the acquisition of Louisiana, proof is required of the officers who make the grants for, and in the name of the company, because "nothing is known to the committee of the company, or its officers."

The Supreme Court have established, in the cases of Arredondo, Clarke, Soulard, Mitchell and others, that, upon the production of a grant, the presumption of law arises, that there was full authority to make it, until the contrary is shown. By the comity of nations, the tribunals of all countries are to presume, that every public officer of a foreign government acts within the legitimate sphere of his duty, until proof is adduced to refute so reasonable a presumption.

As those obvious principles of general law are contested, it appears, without reference to the sanction given to them by the highest court of the United States, in cases where it is supposed the jurisdiction of that court may not reach, the records of France and the "*Compagnie des Indes*" have been examined, to explain, for the information of those whom it may concern, who their officers were.

It appears from the records of the Colonies and Marine, that on the 20th of September, 1717, the King of France by a royal commission appointed Bienville, commandant-general of Louisiana. The commission commences thus:—

"Being necessary for the good of our service and the utility and advantage of the '*Compagnie d'Occident*' to establish a commandant-general in Louisiana, in place of M. D'Epiney, governor of that colony."

Then follows the usual recitations of confidence, capacity, &c.

"For these causes and upon the presentation of the said Bienville, by the directors of the *Compagnie d'Occident*, we command; order, and establish," &c., dated 20th of September, 1717.

On the same day, a royal commission was issued by the king reciting that Boisbriant, having been presented to him by the directors of the "*Compagnie d'Occident*," and it being necessary, his majesty appoints him (Boisbriant) now commandant on the river Mobile, commandant-general in case of the absence or default of Bienville."



It appears by this commission that Boisbriant was at that time commandant at Mobile and in that capacity, had all the powers appertaining to the office, the least of which was to grant lands, when they could find persons to accept them. Under these commissions Bienville, the commandant-general at New Orleans, and Boisbriant, the commandant of Dauphine Island District, continued to make concessions and distributions, and all the lands in the vicinity of Mobile and New Orleans, granted before 1731, are held by titles made under these or similar commissions.

The committee seem to have considered Boisbriant as subordinate to, and appointed by the commandant-general Bienville, when in fact he was commissioned by the king upon the nomination of the directors of the "*Compagnie d'Occident*," to all the powers of Bienville in his absence or default, and at the same time he was invested with the same authority in the district of Dauphine Island and Mobile.

If the fragments of history and the scattered records at the end of a century of continued revolution in the mother country, and in the province, furnished no other evidence, we might here rest the case upon the documents given. They establish the fact that Boisbriant was an officer of the company, and of the king, having their confidence to such an extent as to command a district and to be the governor-general and commander-in-chief, when Bienville was absent, for the whole of Louisiana. By the laws and usages of France, as well as of Spain, the commandants of districts and the commandants general had authority to grant lands within their respective jurisdictions. The practice was universal. Under the Spanish government in the absence of the charters and authorities here referred to, the powers of the Lieutenant-governors and commandants of St. Louis, Mobile, Pensacola, and East Florida, were contested by the United States.

That question was adjudged after elaborate argument, and the decision now constituting the law of the land in the United States is that a grant, or concession, made by an officer under a foreign government, in the course of his ordinary or accustomed duties, creates a legal presumption that he acts within the sphere of his duties until proof is made by those who deny, that such power does not exist.

In the case of Arredondo, it was decided that fraud cannot be presumed, but must be proved, and that the signature of an officer in his official character will always be received upon the principle that public functionaries are supposed to act with legitimate, and not usurped functions.

Every country and government has its own mode of regulating the conduct of and enforcing the accountability of its officers. In monarchies, powers are given without specification or definition: and responsibility is enforced with a rigor corresponding with the discretion given. In France and Spain, periodical reports of public functionaries were required, the administration of officers acting in the

province were always approved by the renewal of a commission, or by promotion to some higher employment. The crown was always represented by its proper procureur du roi, or fiscal (attorney general,) and every sentence not appealed from of the lowest tribunals, were considered, and indeed declared by law to be final, whether it related to lands or other subjects.

Even concessions on condition would not be vacated, where the condition was not complied with, without a process similar to the inquest of office in England, where the party was summoned to show cause; if he gave a good reason, such as *force majeure* (the act of God or king's enemy) his conditional right was not forfeited. There is in the office of the Colonies and Marine, a curious official despatch upon this subject. The commandant reports that, in cases of absolute concession to persons for meritorious services, he grants at once in *franc aleu* (fee simple). In cases of conditional concessions, he deems it most advisable to declare that, upon the performance of the condition, the directors will give a title, so that the grantee may apprehend that no favor will be shown him on account of acquaintance, or personal partiality, if he does not perform his contract with fidelity. All these questions, however, have been discussed and decided, and without any other proof than the historical fact that Boisbriant granted lands for, and in the name of the company. The legal presumption would be sufficient of his character, station, and authority.

We are not left, however, to depend upon this principle just and well supported as it is.

The archives of France furnish evidence that will put that question to rest. In the "Registre, Comptes des Indes, Vol. 2," in the records of Louisiana from 1721 to 1731, page 103 of Vol. 2, is to be found a regulation for the establishment "d'un conseil provincial aux Illinois," "to exercise in *chief*, jurisdiction, civil and criminal, and to *govern* the affairs of the 'Compagnie des Indes' of that place and its dependencies. Its jurisdiction shall extend to all the districts above the river Arkansaw." "The said council shall be composed of Sieur Boisbriant, first lieutenant of the king in Louisiana, *commandant* of the Illinois in quality of chief and judge." This commission conferred more extensive jurisdiction and higher rank than was ever conferred by the king and "Compagnie des Indes," upon any officer in Louisiana. The commission is dated 22d May, 1722, and the concession to Renaut was made on the 14th of June, 1723.

Monsieur Des Ursins was one of the provincial council, and secretary to the government of the commandant Boisbriant. This council was established at the recommendation of the commissaries of the king, receiving the sanction of the king and company.

The commission of Bienville contains no other power than that quoted. As commandant of the province, he was the representative of the king and company in Lower Louisiana, and in the celebrated controversy between Mr. Jefferson and Edward Livingston, involving the title to the Batture at New Orleans, no question was ever made

of Bienville's concession\* to the Jesuits, or any other that he made. It is established beyond controversy then, that a concession in full and absolute property made by a competent authority, without condition, in proper form signed and countersigned, was made to Renaut at the date above stated.

The calls of the grant are specific, but a number of the rivers and creeks have, in the subsequent changes of jurisdiction and sovereignty, also changed their names. The localities, however, are established in a map, made by Diron, engineer of the king, in the year 1724, which not only establishes the identity of the land, but is corroborative evidence of the official and public notoriety of the grant, if corroboration could be required in so incontestible a claim.

In the year 1723, Renaut had a title to the lands described. In 1744, it was recognised by sales of portions. In 1762, the province was ceded to Spain. In 1763, a part of it to Great Britain, and by the American revolution and Louisiana treaty, the whole became a part of the United States.

How, or in what manner, has Renaut or his heirs lost their title? There is no prescription in favor of government, state or federal. There is no escheat, because heirs are out of the state, or the United States. If there were any disabilities created, which is denied, they were removed by the acts of congress, admitting all French titles. The acts of the federal government, so far as principle is involved, are all in favor of the right of the heirs. The state government of Illinois, by its legislature, presented a memorial to congress, praying that the title might be confirmed. In our complicated system of government, federal and state, it might so happen that local laws in some instances might conflict with the obligations of the federal government under the laws of nations and treaties, in which event, the duty would be imposed upon the courts of deciding as they would inevitably do, in a case like the present, that no state law could even create an incumbrance in any manner whatever upon a foreign title protected as this is. If there was not established by the constitution a permanent and controlling authority, which annuls all state enactments in conflict with it, there might be presented to the world such a flagrant act of injustice as that of the government charged with the foreign and diplomatic relations, failing by its delays, omissions, and oppressions, to recognise by law, or to furnish a tribunal to decide upon a foreign title, whilst a subordinate state government, by its limitations, prescriptions, taxes, and other enactments, were impairing and destroying a title which could not be enjoyed from the acts, or omissions of the national government.

Up to the period of the decision of *Percheman's* case, it was not regarded as established law, that a foreign claimant could maintain an action of ejectment until congress had acted upon his title. The congress, therefore, until the year 1833, was the only tribunal known

\* It has since been ascertained that Bienville granted to the Jesuits as proprietor.

to, or recognised by, the laws and usages of the United States, to which an appeal could be made. No act of the state up to that period, could create a prescription in favor of an adverse occupant, or in any other manner, encumber the title.

There is, however, no conflict between the federal obligations, laws of nations, and treaties, in this respect, and the laws of the *locus in quo*, where the lands are situated. By the 48th section of the act regulating descents, in the State of Illinois, it is provided:

Sect. 48. "All foreigners, whether aliens, denizens, or naturalised citizens, may take and hold real estate, in this state, either by purchase, or descent, and alienate and transmit the same to their heirs, or assigns, whether such heirs or assigns be citizens of the United States *or not*, in the same manner as natural born citizens may or can do, and the children of such persons dying intestate, whether citizens of the United States *or not*, shall inherit, &c." There is a similar act in Missouri.

1. It has been shown that the grant to Renault was made by a competent officer of the crown of France, charged with the government of the affairs of the "Compagnie des Indes," when France held the sovereignty, and that Company the property of the province of Louisiana.

2. That all similar concessions for smaller quantities in the absence of all the authorities and facts now presented, made by the same officers at the same time, have been respected by the governments of Great Britain, Spain, and the United States.

3. That such titles are protected against any government federal, or state, by the laws of nations as expounded, and declared by the supreme court of the United States.

4. That this title and all others of a similar character, made by the same officers, with less formality, have been admitted, recognised and confirmed by the United States.

5. That it is not competent for Congress to pass any law, to impair or encumber such a title.

6. That the permission given to the commissioners to take cognizance of it, is itself a legislative recognition that no disabilities of time alienage, cession or retrocession had affected the title of the heirs of Renault.

7. That the acts of the general assembly of Illinois and Missouri protect the descent to the heirs, and that, in the absence of such an enactment, the right would have been equally perfect.

8. That every principle upon which this title rests, has been examined, discussed and decided in its favor by the Supreme Court.

9. That this title, subsisting as described, and being the property of French subjects, was as perfectly protected and confirmed by the first treaty between France and the United States, against all acts of Congress, state laws, limitations, forfeitures and prescriptions as the titles of Arredondo and Percheman were, by the Florida treaty of the 22d of February, 1819.

10. That this title was again confirmed by the Louisiana treaty of 1803, by excepting it from the cession as "private property."

11. That it has been recognised by all the acts of Congress in Upper and Lower Louisiana, declaring the special tribunals open for *French* as well as Spanish titles.

12. That it was made by duly authorised officers of the crown and company, with the privilege and at the request of the company.

13. That by the laws of Missouri and Illinois, aliens are authorised to take and hold by descent.

14. That if such provision had not been made, the descent is protected by the laws of nations and treaties, before referred to, which are paramount to all state laws.

These points, it may fairly be said, have been, and will be established by authentic documents, proofs, judicial decisions, legislative acts and royal commissions.

Renaut died in 1755; his heirs presented their title within a very short period after the passage of an act of Congress, authorising its presentation, in the year 1807. The United States' commissioners reported in its favor, the question was remitted for a more positive decision; a second report was made in its favor, and from that day to the present, whatever of injustice or injury has been done, cannot be imputed to Renaut's heirs.

They have made continual claim. Their petitions sleep upon the files of Congress until *time* is pleaded as a forfeiture by a committee who, it is apparent, did not understand a single legal principle involved in it, and who resisted, overruled, nullified and reversed all the doctrines of the supreme court.

For the first time in the history of any country in the world, prescription is pleaded in favor of the government. Between the year 1755 and the year 1803, Renaut's death, and the Louisiana treaty, the country was the theatre of war, and so near the most savage of the tribes of the North American Indians, that the heirs could not have taken possession. Since 1803, the United States as a nation, if the odious prerogative were admitted, could not have acquired a title by prescription, because they were no more in possession than Renaut's heirs. If such an absurd pretension could be tolerated for a moment, by all the rules of the civil and common law, the pendency of a perpetual claim, the presentation of petitions and the report of bills to confirm the title, would suspend the operation of limitation or prescription laws. There is not and cannot be any such right in favor of government—It is their own wrong that they have not acted upon the bills reported, or provided a tribunal to try these titles.

The more important question then arises during this period from 1807 to the present day, whilst these claimants have been fruitlessly appealing to Congress to perform its national obligations by a confirmation of the title. Can an adverse interest be created by what is called in common law countries, limitation of action, and where the civil law prevails, prescription? These limitation laws and prescrip-

tions are acts of the state legislature. It is admitted that they may pass statutes of limitation, as to actions in their own courts between their own citizens, but it is denied that they can in any manner impair or destroy the title of a foreigner, whose right is protected by the laws of nations and treaties, when the failure to assert it in the mode to prevent the operation of such laws is denied by the paramount government. If such a doctrine were maintained, the laws of nations, treaties and the federal government itself would become subordinate to state laws, and we should have a worse anarchy than existed under the confederation.

If the states can, in this partial and qualified manner, impair or destroy the rights of property, when the individual is seeking the only remedy afforded him by the Federal government, I see nothing to prevent their passing a general forfeiture of all the lands within the state, owned by non-residents *within*, or *without* the United States.

The individuals who are upon these lands, must hold them either with or without title. If the latter, they are mere trespassers. If the former, their pretensions are founded upon sales and grants of those who had no right to sell and to grant.

As the Chief Justice said in the case of *Percheman*, speaking of the King of Spain "Lands he had previously granted, were not his, to cede." If the king after a grant to a subject, could not cede the same land to a foreign government so as to constitute property in that government, it follows that the United States could not sell or grant lands previously granted by France. The United States have then sold Renaut's lands and the occupants plead a statute of the state, as a limitation to a recovery, at a time when the federal courts denied the right to institute a suit, and then by a sort of concerted action of two governments constituting the same body politic, a most singular result is produced by the annihilation of a title which neither government can destroy without a violation of the constitution, and laws of nations.

Such a result would be a political phenomenon, a combination of absurdity and despotism.

The grant to Renaut gave him a legal constructive possession. This was followed by actual possession, use, and sales of portions. His heirs succeeding to his right of property thus created have had also that constructive possession.

An adverse possession under a junior title, must be exclusive, and there is no constructive right to the extent of the limits of the junior title in consequence of the pre-existing constructive right to the person holding the prior title. It is a maxim of the civil law that prescriptive titles must be always strictly proved. Prescriptions are odious. "*Prescriptiones sunt odiosæ et ideo stricti sunt interpretandæ.*" To constitute a title by prescription, the possession must be civil, exclusive, uninterrupted, public, held in good faith, under a just title. 4 Pothier, 587, Code, lib. 7 tit. 34. A constructive possession does

not constitute prescription, it must be actual and exclusive. 4 Pothier 591."

If the statute of limitation could in any case avail any one of the parties on the land, it would only be to the extent of his actual enclosure and not to the extent of his purchase, as two constructive possessions cannot exist at the same time upon the same land. It is denied, however, that independent of the laws of nations, and the two treaties referred to, which are paramount to and nullify all state limitations and prescriptions, that upon ordinary principles of judicial decision, in the absence of these controlling obligations, that any occupant can be protected by such a bar. To constitute such a claim in any case, the possession must be "exclusive, held in good faith, under a just title." Neither Spain, the successor of France, nor the United States, could confer a just title on any individual, of the property of another. The attempt to appropriate it in any manner, by sale or grant is unconstitutional. "A prescription to be good must be in good faith under a *legal* title." Inst. lib. 2 tit. 6. "*Jure civile constitutum erat ut qui bonâ fide.*" 4 Pothier, 588. "The good faith that ought to accompany a possession to complete a prescription may be defined, the just opinion which the possessor has, that he has acquired a property in the thing." Now inasmuch as the title of Renaut's heirs was presented, favorably considered and bills reported for its confirmation, it is impossible that any subsequent purchaser could enter, or hold in good faith. "*Justa opinio quærita domini.*"

"If I buy real estate from one who has only authority to collect rents and thinks he has a right, this is not a just opinion and therefore no foundation for prescription." Pothier.

"Si quis id quod possidet, non putat sibi per leges licere usu capere dicendum est, etiam, ei erret non procedere tamen usu capionem," Dig. de usu, chap. 31 32.

"The title under which a prescription is claimed must not only be one which in its nature is capable of transferring the property, but that it must be:

"1st. A valid title.

"2dly. It must not be suspended.

"3dly. It must be continued."—4 Pothier, p. 608.

The title being invalid, nothing can be acquired by prescription.

It is very evident, that from the year 1807, when this title was presented to the American government, recorded in the country, where the land lies, a pre-existing record subsisting at the seat of government of the old colony of Illinois, that there could not be any such civil possession, or *just confidence*, as to commence a prescription. The occupants are either trespassers, or have purchased from a vendor, who had no right to sell, and in one case they have not a color of claim and, in the other, their only remedy is against the grantor.

It is believed that upon no principle of justice, good faith or law, can any statute of limitation be pleaded. It is very well understood

that one of the states within which these lands are situated, has, pending this controversy, attempted to encumber the title of the heirs by taxing that which the parent and paramount government did not allow them to enjoy. If this property is, as it is believed to have been demonstrated to be, under the protection of the laws of nations and treaties, to the obligations and fulfilment of which the United States are pledged; it cannot be perceived upon what principle, in the face of the ordinance and acts of Congress exempting the United States' lands from taxation, any state can impose a tax, until by some legislative act, or judicial decision, the private property is separated from the public domain.

By the laws of the United States, penalties are imposed upon any one, who shall, under any pretence, take possession of lands claimed by the government, and whilst the federal government is holding these denunciations and penalties over the head of a foreign claimant, the state is sacrificing, by exactions and taxes, a right not yet admitted and depending for two generations, for decision.

Such laws must be held equally null and void for the reasons before given. Some apology may be found for the manner in which this title has been treated, in the fact that no one in the United States has ever had a correct conception of the powers, privileges and exclusive dominion of the "*Compagnie des Indes*," nor of the commissions of its officers. It was only in *cartons*, which have slumbered for a century in the Palace of Versailles that these, unquestionable official proofs of the rights of these parties, have been found.

It would be disrespect to Congress to permit a supposition that, after this exposition founded upon such authentic evidence, there could be any doubt of a speedy recognition of this title. In the controversy between Mr. Jefferson and Mr. Livingston, which has been considered as one of great legal learning on both sides and has divided the profession in the United States as to its relative ability, we find in the former such errors as the following. Mr. Jefferson says: "Not long after the establishment of the city of New Orleans, Louis XIV granted to the Jesuits, lands adjacent to the city on the 11th of April 1726." Louis XIV died the 1st. of September 1715, eleven years before the grant to the Jesuits, which was made by Bienville, the grantee of the "*Compagnie des Indes*."

Mr. Livingston also states that the Company "*d'Occident*" succeeded to the rights of Crozat, when in fact Crozat never had by the Royal grant to him, any right in the soil, except a qualified interest in the mines connected with his grant of the exclusive commerce of Louisiana. It is not wonderful then, when these distinguished juriconsults have fallen into such mistakes from the obscurity and perplexity of the subject, that a committee of Congress cannot, in a few months without books or documents, arrive at a correct knowledge of such a subject. It is for this, as well as for other more important considerations, that the safest and best course would be to have followed those sound maxims of constructions established by the Su-



preme Court founded upon the judicial presumption of general law required by the comity of nations.

The last question submitted to the undersigned is whether an action of ejectment can be maintained upon such a title?

Prior to the decision of the Supreme Court in *Percheman's case*, it was regarded as a doubtful question, and it was for that reason, the case was so elaborately argued. The principle is established in that case, that if the title be "consummate," no provision by law or treaty is necessary to authorise a suit upon it, or to give validity to what is already perfect.

A few words only may be added upon that point. By the ancient French laws, lands were held by a variety of ancient customs founded upon the feudal system. These were confined to provinces, districts and towns, the subjects of feudal sovereignties.

These various customs were reduced to a code or system in consequence of an edict of Charles VII, in the year 1453 —, contemporaneously with Littleton's Book of Tenures in England.

In the southern provinces of France, which had been the most flourishing of the Roman Empire, these customs did not exist.—They were governed by the Roman civil law, and were known as the "*pays de droit écrit*," as distinguished from the "*pays coutumiers*." In the latter, the maxim founded upon their system was "*Nulle terre sans seigneur*." In the former (the south of France) they were held *allodially*, as they were under the Roman emperors in full and absolute property, without feudal condition or subjection. This title has always been known in France by the expressive word "*franc aleu*," *free allodium*.—These customs and codes were subject to the edicts and ordinances of successive sovereigns, registered in parliament and were considered *lex sub graviore lege*. The ordinances for the colonial government have been before analysed, and it has been shown that power was given to the "Compagnie des Indes" to grant lands in "*franc aleu*" or allodium, or as Blackstone defines it, "by a tenure wholly independent." 2 Black. 47. "A tenure which is property in the highest degree, of which the owner is said to be seised absolutely, in his own demesne." 2 Black. 105. "A tenure which existed in the Roman provinces before the feudal system." p. 60. 105.

It must be admitted that if any title in America was *consummate*, it was that of Renaut described in the grant submitted.

The Supreme Court have declared such a title valid independent of any treaty by the law of nations.

It can only be imperfect and incomplete titles requiring legislative action to give them validity, before an action of ejectment can be maintained upon them.

If, however, there were any principle in our constitution or laws requiring a confirmatory act upon a perfect title to authorise the owner to assert his claim in a court of justice, that act will be found in the two treaties referred to. That of 1778, 9th art. removes the disability, if such ever existed, and the treaty of 1803 confirms private

property and thus reserves it from the general cession which would require a particular act of confirmation to enable the party to assert it in a court of justice.—A treaty is as much a law of the land as an act of congress.

I am of opinion:

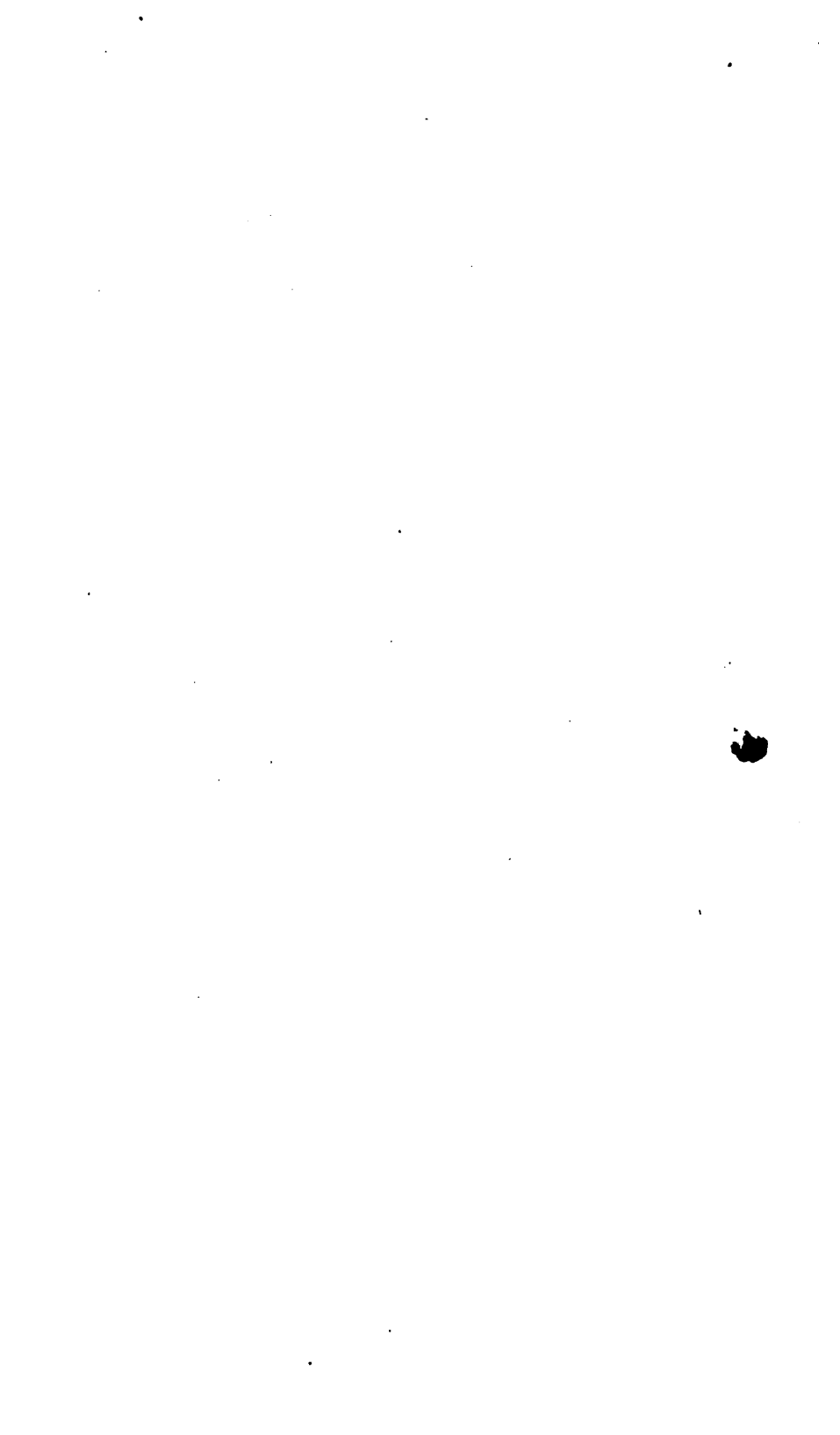
1st. That the heirs of Renaut have a perfect legal title to the lands described in the grant.

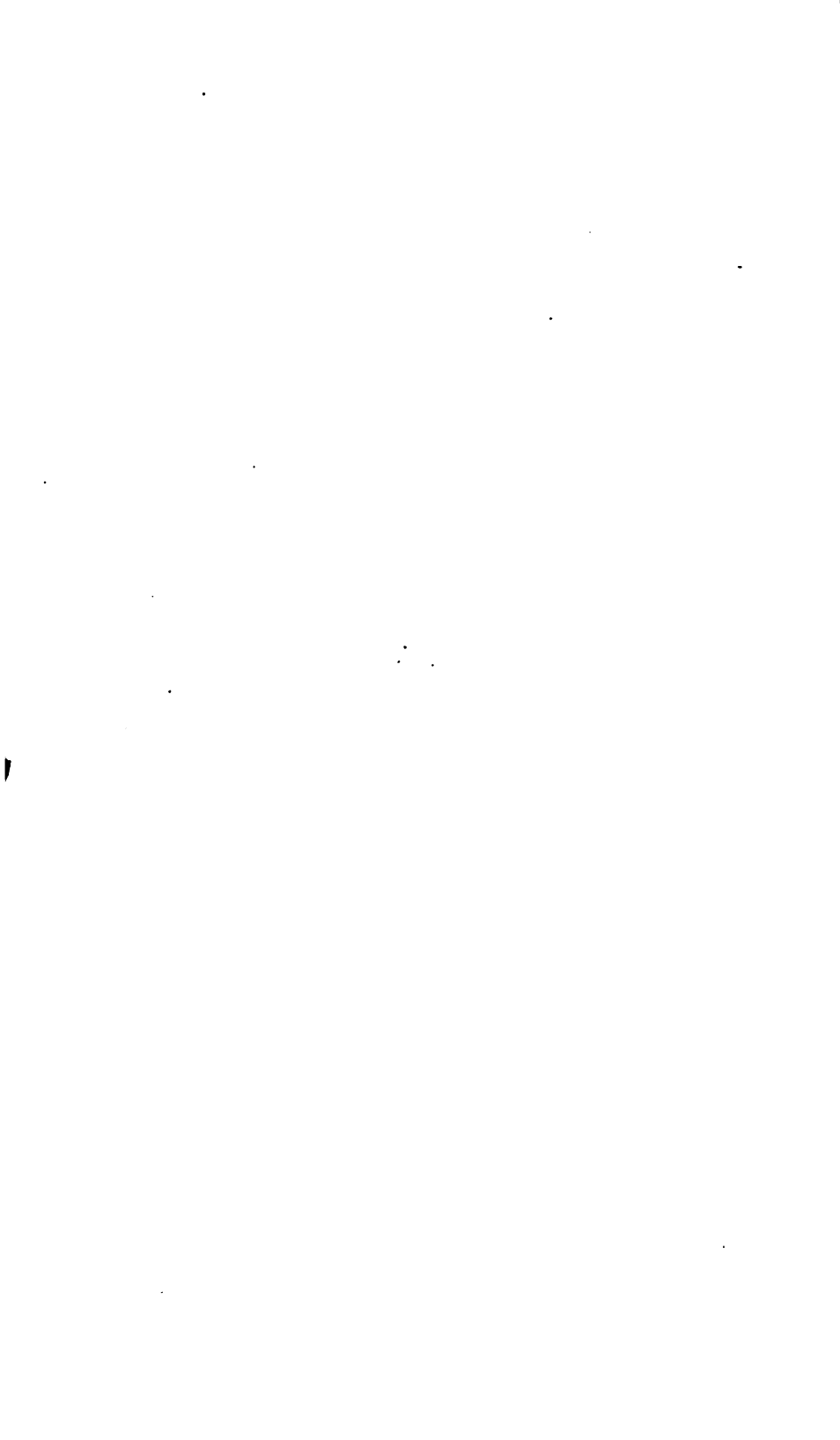
2dly. That an action at law can be maintained for their recovery in the courts of the United States.

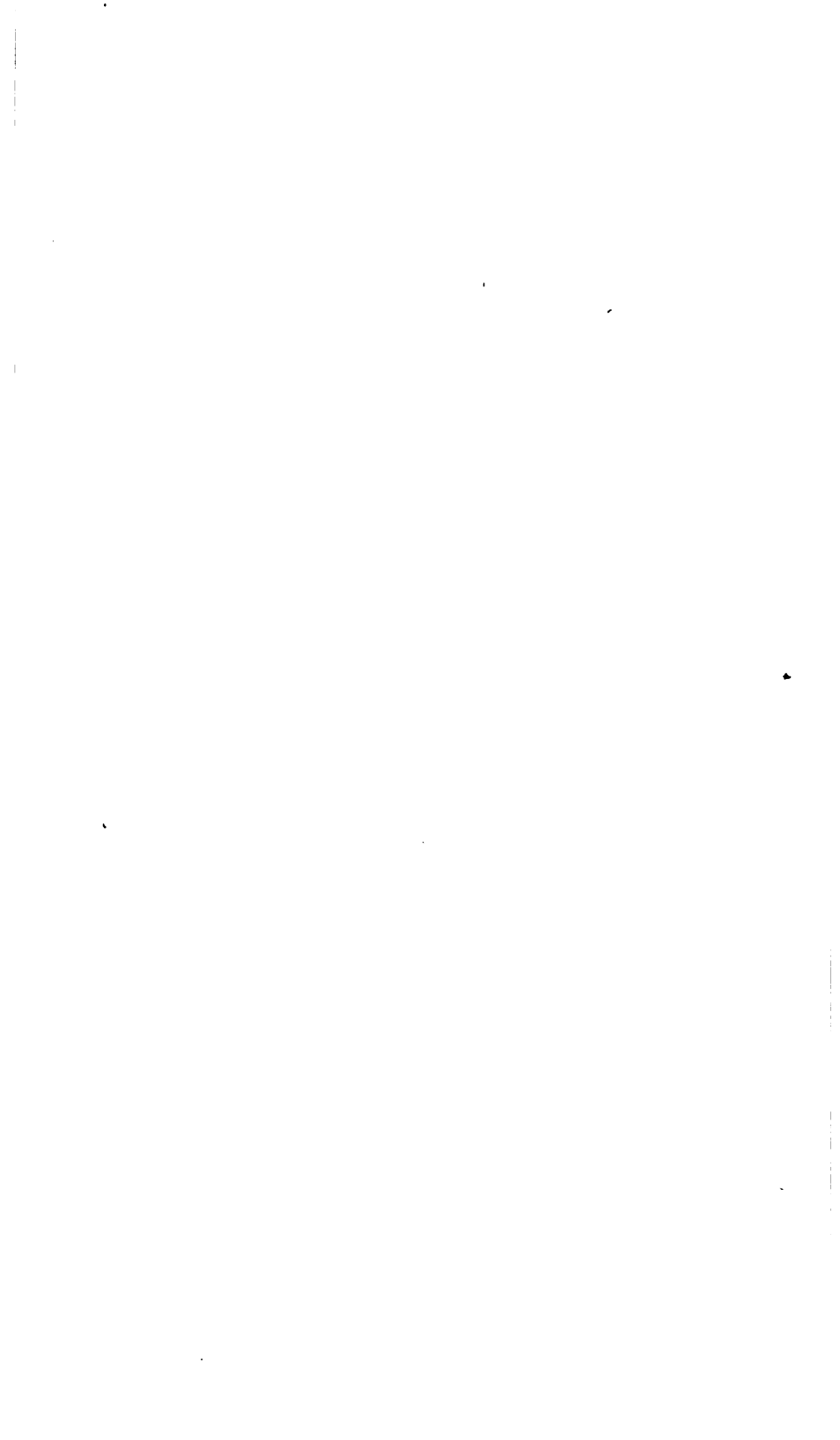
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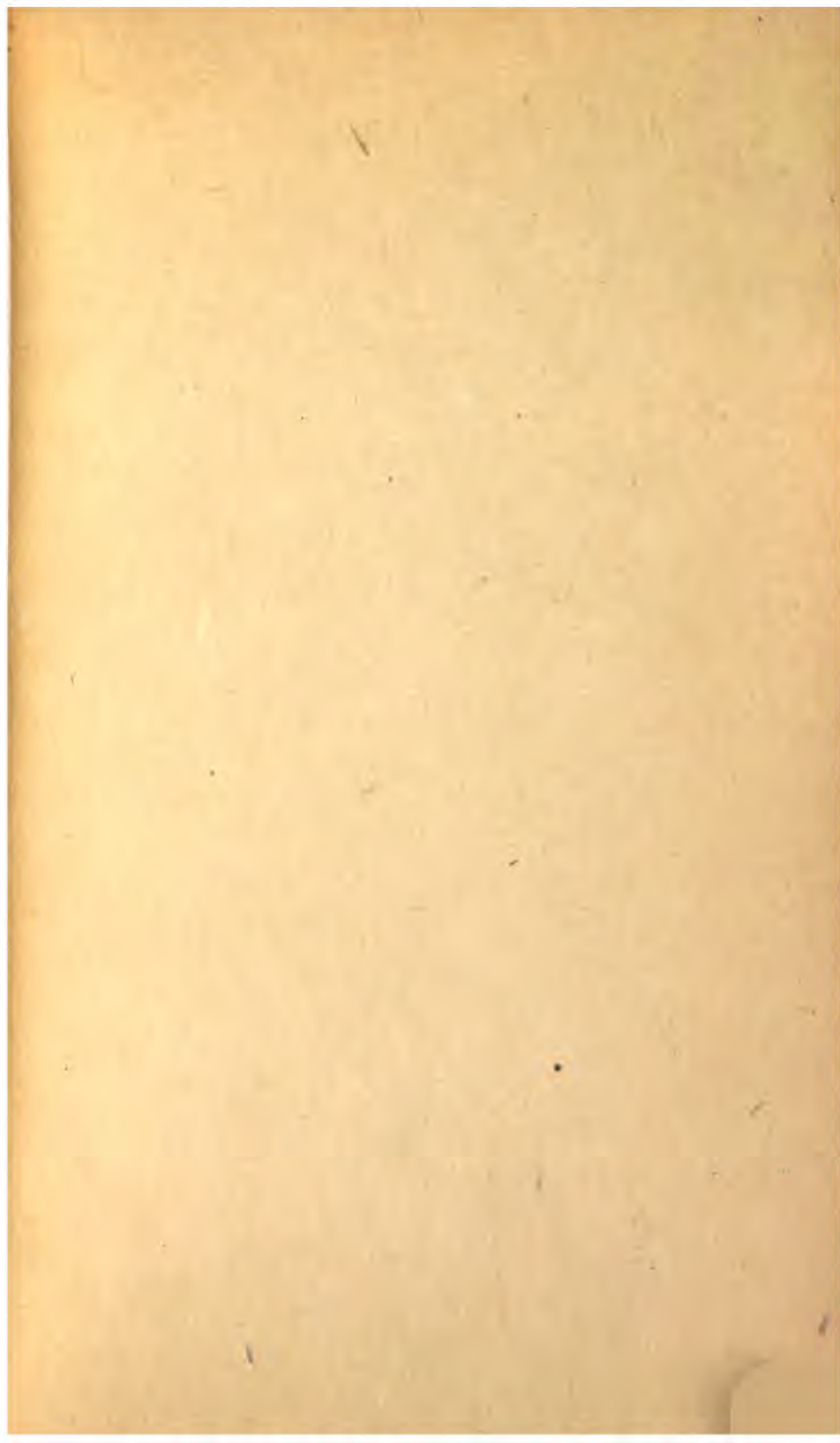
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